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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 41

No. 64 3

THE TIMES-MIRROR COMPANY AND I. D. HOTCHKISS, PETITIONERS,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STAT OF CALIFORNIA

PETITION FOR CERTIORARI FILED MAY 4, 1940.

CERTIORARI GRANTED JUNE 3, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

THE TIMES-MIRROR COMPANY AND L. D. HOTCHKISS, PETITIONERS,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN SUPREME COURT OF CALIFORNIA

L. A. No. 16928

THE TIMES-MIRROR COMPANY, a Corporation, and L. D. HOTCHKISS, Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

PETITION FOR WRIT OF REVIEW

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the State of California:

Come now The Times-Mirror Company, a corporation, and L. D. Hotchkiss, petitioners herein, and file this their Petition for Writ of Review, and in support of said petition respectfully allege:

I

The petitioner The Times-Mirror Company is and at all times herein mentioned has been a corporation organized and doing business under and by virtue of the laws of the State of California.

The Times-Mirror Company is now and at all times herein mentioned was the publisher of that certain daily newspaper printed, published and circulated at and from the plant and place of business of said The Times-Mirror Company, in the City of Los Angeles, County of Los Angeles, State of California, known as "Los Angeles Times."

The petitioner L. D. Hotchkiss is and at all times herein mentioned has been resident in the County of Los Angeles, California, and managing editor of said newspaper known as "Los Angeles Times."

[fol. 2]

II

On May 13, 1938, one J. Louis Elkins, Secretary of the Los Angeles Bar Association, subscribed and swore to a certain affidavit, which affidavit on June 3, 1938, was presented by Allen W. Ashburn, Esq., Michael G. Luddy, Esq., Isaac Pacht, Esq., and Arnold Praeger, Esq., as attorneys for the Los Angeles Bar Association, to the presiding judge of said Superior Court, and thereafter on said last men-

tioned date said affidavit was filed by the clerk of said court. A full, true and correct copy of said affidavit is attached hereto and marked "Petitioners' Exhibit No. 1."

III

Upon the presentation of said affidavit to said presiding judge of said Superior Court, and on said 3rd day of June, 1938, said presiding judge of said Superior Court made and entered an order wherein and whereby The Times-Mirror Company, Harry Chandler, Norman Chandler and L. D. Hotchkiss, were ordered to appear before said court, Department 1 thereof, on the 23rd day of June, 1938, at the hour of 10 o'clock A. M., then and there to show cause why they and each of them should not be adjudged guilty of contempt of court and punished therefor. A full, true and correct copy of said Order to Show Cause is attached hereto and marked "Petitioners' Exhibit No. 2."

Thereafter, and in response to said Order to Show Cause, your petitioners appeared before said Superior Court, by and through their attorneys, at the time and place designated in said order hereinbefore referred to. Thereupon said matter was continued until July 1, 1938, at which time the presiding judge of said Superior Court duly made an order transferring said proceedings to Department 34 of said court. Thereafter the judge sitting in said Department 34, duly made an order fixing July 5, 1938, at the hour of 10 [fol. 3] o'clock A. M. in said Department 34 as the time and p' ce for the hearing of said matter.

The matter came on regularly for hearing at said time and place upon said Order to Show Cause and said affidavit of J. Louis Elkins. Thereupon the respondents, and each of them:

1. Moved the court that the proceedings be entitled "People of the State of California vs. The Times-Mirror Company, a corporation, Harry Chandler, Norman Chandler and L. D. Hotchkiss, respondents in contempt."

2. Objected to any party other than the State of California prosecuting the proceeding and objected to any attorney appearing or acting or being permitted to appear or act as prosecuting attorney therein other than the Attorney General of the State of California or the District Attorney of Los Angeles County.

3. Objected to the Los Angeles Bar Association or any committee of said association or anyone appearing or claiming to appear as attorney for said association or for any committee of said association appearing or acting or being permitted to appear or act as attorney or attorneys for the prosecution of the proceeding.

4. Moved the court for an order directing that the District Attorney for the County of Los Angeles and the Attorney General for the State of California be notified of the proceeding and for a further order directing that no other or further proceeding be had or taken herein until said District Attorney or said Attorney General shall appear herein as attorney for the prosecution of this proceeding.

5. Objected to any proceedings being taken herein unless and until the People of the State of California are made a party hereto and appear herein by the proper officer of said state in that behalf duly authorized.

[fol. 4] 6. Objected to the Los Angeles Bar Association or any committee of said association or anyone appearing or claiming to appear as attorney for said association or for any committee of said association controlling or directing either as attorney of record or otherwise the prosecution.

Said objections and motions were made upon each of the following grounds, to wit:

(a) This is a prosecution for a crime, to wit, criminal contempt of court.

(b) Prosecution for crime must be in the name of The People of the State of California.

(c) The District Attorney is the public prosecutor and must attend the court and conduct on behalf of the people all prosecutions for public offenses.

(d) Neither the Los Angeles Bar Association nor any association or person other than The People of the State of California may prosecute this proceeding.

Thereupon on said 5th day of July, 1938, following the presentation of argument by counsel for respondents (petitioners herein) in support of the motions and objections and following the presentation of argument by counsel for

the Los Angeles Bar Association in opposition to the motions and objections, said motions and objections were, and each one thereof was, denied and overruled. Counsel for the respondents, and each one thereof (petitioners herein), took and saved an exception to the rulings of the court on each of said motions and each of said objections.

At the time of filing said affidavit of J. Louis Elkins, Secretary of the Los Angeles Bar Association, on June 3, 1938, no order of said Superior Court was made or entered, and since said June 3, 1938, no order of said Superior Court or [fol. 5] of any judge thereof has been made or entered in this proceeding, or in the records of said court, directing, requesting or authorizing said Los Angeles Bar Association, or said attorneys for said Los Angeles Bar Association, to file said affidavit or, after the filing of said affidavit, to prosecute this proceeding on behalf of said court or any department thereof or on behalf of any judge sitting in any department of said court.

IV

Prior thereto, on, to wit, June 28, 1938, your petitioners filed with the clerk of said Superior Court a demurrer to the sufficiency of said affidavit, together with points and authorities in support thereof. A full, true and correct copy of said demurrer (points and authorities omitted) is attached hereto and marked "Petitioners' Exhibit No. 3."

Thereafter, on, to wit, July 5, 1938, and subsequently, said demurrer was argued, and thereafter, on July 14, 1938, submitted. Upon consideration, said Superior Court on, to wit, August 18, 1938, overruled said demurrer to the First, Third and Fifth Counts of said affidavit and sustained said demurrer without leave to amend to the Second and Fourth Counts thereof, and made its further order setting said matter for trial on Thursday, August 25, 1938, in said Department 34.

V

At the time of argument on said demurrer, in addition to other contentions advanced, your petitioners and each of them urged, through their counsel, that the proceedings herein were violative of the rights guaranteed to your petitioners by the First and Fourteenth Amendments to the United States Constitution, in that an adjudication that petitioners were guilty of a contempt of court for the pub-

[fol. 6] lication of the articles set forth in said affidavit would abridge petitioners' right of freedom of speech and of the press, and would deprive petitioners of their liberty and property without due process of law. A full, true and correct recitation of the language in which said federal constitutional question was raised by counsel for your petitioners herein is attached hereto and marked "Petitioners' Exhibit No. 4."

VI

Thereafter, on August 22, 1938, The Times-Mirror Company, Harry Chandler, Norman Chandler and L. D. Hotchkiss, filed verified answers to said Order to Show Cause; full, true and correct copies of said answers are attached hereto and marked Petitioners' Exhibits No. 5, No. 6, No. 7 and No. 8, respectively. Petitioners on said August 22, 1938, also filed in response to said Order to Show Cause the affidavit of Harry Chandler and the affidavit of F. B. Yoakum, Jr. Said affidavits were made and filed on behalf of each of your petitioners herein. True copies of said affidavits are attached hereto and marked Petitioners' Exhibits No. 9 and No. 10, respectively.

VII

On Thursday, August 25, 1938, said matter came on regularly for hearing in said Department 34 upon said Order to Show Cause, and Counts One, Three and Five of said affidavit of J. Louis Elkins, and upon said answers and said affidavits of respondents (petitioners herein); the prosecution of said proceedings being conducted by counsel on behalf of Los Angeles Bar Association; testimony was taken, evidence was introduced, arguments were heard and the matter submitted for decision; whereupon, on August 31, 1938, said Superior Court, Department 34 thereof, made, signed and filed, and on September 1, 1938, caused to be entered, its judgment and order wherein and whereby

[fol. 7] "1. The Court finds that the allegations of counts (1), (3), and (5) of said affidavit of J. Louis Elkins respecting the respondent The Times-Mirror Company are true and that the said respondent, The Times-Mirror Company, a corporation, is guilty of contempt of court as specified, and in the particulars set forth in the order to show cause herein and in the said affidavit of J. Louis Elkins in counts

(1), (3), and (5) thereof, and that as punishment therefor, the Court orders that the said respondent, The Times-Mirror Company, a corporation, shall pay a fine of $100.00 on count (1), $100.00 on count (3), and $300.00 on count (5), as set forth in said affidavit, making in all the sum of $500.00, for which amount let execution issue.

"2. The Court finds the respondents Harry Chandler and Norman Chandler not guilty of contempt of court as to all three of said counts in said affidavit.

"3. The Court finds the respondent L. D. Hotchkiss not guilty of contempt of court on counts (3) and (5) as set forth in said affidavit.

"4. The Court finds that the allegations of count (1) as set forth in said affidavit of J. Louis Elkins respecting the respondent L. D. Hotchkiss are true and finds the respondent L. D. Hotchkiss is guilty of contempt of court as specified, and in the particulars set forth in the order to show cause herein and in count (1) of said affidavit of J. Louis Elkins, and orders him, the said L. D. Hotchkiss, to pay a fine of $100.00 on said count (1), and that in default of payment thereof, the said L. D. Hotchkiss shall stand committed to the Sheriff of the County of Los Angeles, State of California, and, until such fine is paid, he shall be imprisoned in the county jail of said county at the rate of one days' imprisonment for each $2.00 of said fine."

A full, true and correct copy of said order or judgment is attached hereto, marked "Petitioners Exhibit No. 11."

VIII

No affidavits or verified pleadings were filed in said proceedings against your petitioners, or either of them, other than the aforesaid affidavit of J. Louis Elkins.

IX

Your petitioners are informed and believe, and upon such information and belief allege the fact to be, that said Supe- [fol. 8] rior Court had no jurisdiction to make said order or judgment for the reason:

First. That the proceedings were not properly entitled and that the motion of the petitioners herein made at the

inception of the hearing to have said proceedings properly entitled was denied by the court.

Second. That the Los Angeles Bar Association and its attorneys were without authority to prosecute said proceedings and that the objections of the petitioners to said Bar Association and its attorneys prosecuting said proceedings, and the motions of the petitioners to have the Attorney General of the State of California or the District Attorney of the County of Los Angeles notified of the pendency of said proceedings, which objections and motions were made at the inception of said proceedings, were denied and overruled by the trial court.

Third. That said proceedings were instituted and prosecuted by the Los Angeles Bar Association and its attorneys and that no order of said court or of any judge thereof was made or entered authorizing the institution or prosecution of said proceedings by said Los Angeles Bar Association or its attorneys.

Fourth. The matters alleged in said affidavit of J. Louis Elkins did not state facts constituting a contempt of court by your petitioners, or either of them.

Fifth. The evidence received during the hearing of said proceedings did not establish facts sufficient to prove that a contempt of court had been committed by your petitioners, or either of them.

Sixth. Under the constitution and statutes of this state a court is not authorized to proceed summarily in construc- [fol. 9] tive contempt proceedings; right of trial by jury is guaranteed the defendants in this as in other criminal proceedings.

X

Your petitioners have not, nor has either of them, any appeal from said order or judgment, nor has either of them a plain, speedy and adequate remedy in the premises other than by a writ of review. Your petitioners and each of them are parties beneficially interested in this proceeding.

Your petitioners are informed and believe, and upon such information and belief state the fact to be, that said Superior Court, in and for the County of Los Angeles, and said J. Louis Elkins, the affiant named in the aforesaid affidavit (Petitioners' Exhibit No. 1), are parties in interest.

XI

This application is made to the Supreme Court of the State of California upon the following grounds:

1. Said appeal raises important and vital questions of state and federal constitutional law which ought to be determined and decided by this court.

2. It is of vital importance to your petitioners, The Times-Mirror Company and L. D. Hotchkiss its Managing Editor, that the court of last resort of this state definitely determine and define at an early date the limits of proper editorial comment by newspapers upon matters pending in the courts which are of great public interest, importance and notoriety.

3. Such early determination by the Supreme Court is necessary so that in future publications of the Los Angeles Times its publisher and editors may comply with their obligation and duty to the public to print and publish "the facts [fol. 10] with enlightened comment" relating to judicial proceedings, but avoiding comment, editorially or otherwise, which would render your petitioners or the publisher and editors of said Los Angeles Times subject to contempt proceedings.

4. Because "The constitution of every state in the Union guarantees to every citizen the right to freely speak, write, and publish his sentiments on all subjects, and prohibits the passage of any law 'to restrain or abridge the liberty of speech or of the press'" (In re Shortridge, 99 Cal. 526, 533), the problem presented herein for determination is of vital importance and interest to all other newspapers and publishers and the readers thereof in the State of California and elsewhere throughout the United States.

5. The precise question presented for solution by this petition has never been passed upon by any appellate tribunal of the State of California.

Wherefore, your petitioners make application to this Honorable Court to grant them and each of them a writ of review requiring said Superior Court of the State of California, in and for the County of Los Angeles, to certify fully to this Honorable Court, at a specified time and place, a transcript of the record and proceedings in said Superior

Court wherein your petitioners were adjudged guilty of contempt of said court as aforesaid, to the end that said order or judgment be reviewed by this Honorable Court, and that such order or judgment be annulled and be adjudged void and of no effect, and that in the meantime all proceedings for the execution of said order or judgment be stayed.

Cosgrove & O'Neil, T. B. Cosgrove, F. B. Yoakum, Jr., Attorneys for Petitioners, The Times-Mirror Company, a corporation, and L. D. Hotchkiss.

[fol. 11] EXHIBIT No. 1

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

In the Matter of THE TIMES-MIRROR COMPANY, a Corporation, HARRY CHANDLER, NORMAN CHANDLER, and L. D. HOTCHKISS, Respondents, in Contempt

AFFIDAVIT OF J. LOUIS ELKINS

STATE OF CALIFORNIA,
County of Los Angeles, ss:

J. Louis Elkins, being by me first duly sworn, deposes and says:

First Count

I

That he is the Executive Secretary of Los Angeles Bar Association.

That The Times-Mirror Company is now and at all times herein mentioned was a corporation created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the County of Los Angeles, State of California.

That said The Times-Mirror Company is now and at all times herein mentioned was the publisher of that certain daily newspaper printed, published and circulated at and from the plant and place of business of said The Times-Mirror Company, in the City of Los Angeles, County of

Los Angeles, State of California, known as "Los Angeles Times."

That said "Los Angeles Times" has now and at all times herein mentioned had a circulation of over 200,000 copies [fol. 12] per day, most of which said copies of said paper are now and at all times mentioned herein were circulated and read in the City of Los Angeles and the County of Los Angeles, State of California.

That Harry Chandler is now and at all times herein mentioned was the president of said The Times-Mirror Company.

That Norman Chandler is now and at all times herein mentioned was the general manager of said The Times-Mirror Company.

That L. D. Hotchkiss is now and at all times herein mentioned was the managing editor of said Los Angeles Times.

II

That on and before the 21st day of December, 1937, there was pending and undetermined and known to the respondents and each of them to be pending and undetermined, in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action entitled "The People of the State of California, versus William Busick, et al.", Criminal Number 67121 in said court, in which said action the defendants and each of them were charged with a felony, towit, conspiracy to violate Sections 418 and 594 of the Penal Code of the State of California. That, on the 20th day of December, 1937, certain of the defendants in said action were found guilty, as charged, by the jury impaneled in said case, and on said 20th day of December, 1937, the judge who presided at the trial of said action set December 22, 1937, as the day and date for pronouncing judgment and sentencing the defendants so convicted.

III

That on the said 21st day of December, 1937, the respondents, The Times-Mirror Company, a corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, and each [fol. 13] of them, caused to be printed and published and circulated in the City of Los Angeles and elsewhere an issue of said Los Angeles Times; that in said issue of said Los Angeles Times, there was printed and published a cer-

tain editorial entitled "Sit-Strikers Convicted," and which said editorial is in words and figures as follows, towit:

"The verdict of a jury finding guilty the twenty-two sit-strikers who led the assault on the Douglas plant last February, will have reverberations up and down the Pacific Coast and in points farther east.

"The verdict means that Los Angeles is not Los Angeles, that the city is aroused to the danger of davebeckism, and that no kind of union terrorism will be permitted here.

"The verdict may have a good deal to do with sending Dave Beck back to Seattle. For, while the United Automobile Workers have no connection with Beck, their tactics and his are identical in motive; and if Beck can be convinced that this kind of warfare is not permitted in this area he will necessarily abandon his dreams of conquest.

"Already the united farmers and ranchers have given Beck a severe setback. The Hynes hay market is still free and it has been made plain that interference with milk deliveries to Los Angeles will not be tolerated.

"Dist.-Atty. Fitts pledged his best efforts to prevent and punish union terrorism and racketeering in a strong radio address, and followed it up yesterday with a statement congratulating the jury that convicted the sit-downers and the community on one of the 'most far-reaching verdicts in the history of this country.'

"In this he is correct. It is an important verdict. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime.

"The seizure of property by a militant minority, which arrogated to itself the right of dictating not only to employers, but to other workers not in sympathy with it, what should be the terms and conditions of working, has proved to be within the control of local peace officers and authorities.

[fol. 14] "Nobody ran off to Washington to get this affair handled. It was attended to right here.

"Government may have broken down in other localities; whole States may have yielded to anarchy. But Los Angeles county stands firm; it has officers who can do their duty and courts and juries which can function.

"So long as that is the case, davebeckism cannot and will not get control here; nor johnlewisism either."

IV

That said editorial and the statements contained therein referred to and were intended by the respondents and each of them to refer to said action number 67121 and to the defendants found guilty therein and to the verdict of the jury in said action rendered on the 20th day of December, 1937, as aforesaid, and said editorial and the statements contained therein were intended by the respondents and each of them to be understood by persons reading said editorial to refer to said action number 67121 and to the defendants therein and to the verdict of the jury in said action.

V

That the statements contained in said editorial and the publishing thereof in said Los Angeles Times as aforesaid were intended by the respondents and each of them and were in and of themselves calculated and had an inherent tendency to:

(1) Interfere with, influence, sway and control the proceedings in said action number 67121 and interfere with, sway, control, embarrass and influence the actions and decisions of the judge who presided at the trial of said action and whose duty it would be to pronounce judgment and sentence upon the defendants found guilty by the verdict [fol. 15] of the jury therein, and to interfere with, sway, control, embarrass, and influence the actions and decisions of said court in connection with rulings or orders to be made by it on any motions or other proceedings which might legally be made or taken or prosecuted subsequent to the conviction of said defendants and subsequent to the date of the publication of said editorial.

(2) Interfere with the orderly and due administration of justice in said action.

Count Two

I

That he is the Executive Secretary of Los Angeles Bar Association.

That The Times-Mirror Company is now and at all times herein mentioned was a corporation created, organized and existing under and by virtue of the laws of the State of

California, with its principal place of business in the County of Los Angeles, State of California.

That said The Times-Mirror Company is now and at all times herein mentioned was the publisher of that certain daily newspaper printed, published and circulated at and from the plant and place of business of said The Times-Mirror Company, in the City of Los Angeles, County of Los Angeles, State of California, known as "Los Angeles Times."

That said "Los Angeles Times" has now and at all times herein mentioned had a circulation of over 200,000 copies per day, most of which said copies of said paper are now and at all times mentioned herein were circulated and read in the City of Los Angeles and the County of Los Angeles, State of California.

[fol. 16] That Harry Chandler is now and at all times herein mentioned was the president of said The Times-Mirror Company.

That Norman Chandler is now and at all times herein mentioned was the general manager of said The Times-Mirror Company.

That L. D. Hotchkiss is now and at all times herein mentioned was the managing editor of said Los Angeles Times.

II

That on and before the 13th day of February, 1938, there was pending and undetermined and known to the respondents and each of them to be pending and undetermined, in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action entitled "The People of the State of California versus Paul A. Wright," Criminal Number 70170 in said Court, in which said action the defendant was charged in two counts with a felony, to-wit, murder. That said Paul A. Wright pleaded to both counts of said charge not guilty and not guilty by reason of insanity. That, on the 12th day of February, 1938, the defendant in said action was found guilty of manslaughter on both counts by the jury impaneled in said case, and on said 12th day of February, 1938, the judge who presided at the trial of said action set February 14, 1938, as the day and date for trying the issues raised by the plea of the defendant of not guilty by reason of insanity.

III

That on the 13th day of February, 1938, the respondents, The Times-Mirror Company, a corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, and each of them, caused to be printed and published and circulated in the City of Los Angeles and elsewhere an issue of said Los [fol. 17] Angeles Times; that in said issue of said Los Angeles Times there was printed and published a certain editorial entitled "The Wright Verdict," and which said editorial is in words and figures as follows, to-wit:

"There will be little public disposition to criticise the verdict returned yesterday finding Paul Wright guilty of manslaughter, even on the part of those who find it difficult to reconcile the findings with the evidence.

"A glance backward over the long and discreditable record of verdicts in other somewhat similar cases tends the observer rather to congratulate than to find fault with the Wright jury. Under the spell of courtroom eloquence, men and women unskilled in the law too often yield to the fallacious implication that there are times when one is justified in making his own law and executing it upon the spot. Granting, for the sake of argument, that all that Wright said he saw was true, the offense with which he smeared the memories of his dead wife and his dead friend is not punishable by death nor does the law authorize any private person to prescribe and execute its penalty. It is, of course, conceivable that the sight, if he saw it, may so have upset him mentally as to make his subsequent act less than outright murder but not, in this jury's view at least, a thing inferentially to support and applaud by letting it go unpunished. The 'unwritten law' is a form of social anarchy and any verdict supporting it puts a premium on private vengeance, for real or fancied wrongs, everywhere.

"Unfortunately for the public, this verdict does not end the nauseating case. Aside from appeal, Wright has another chance to escape the consequences of his act under the weird California law which enables him to say to the State: 'I didn't do it, but if I did I was crazy at the time and so ought not to be punished anyway.' Such is the effect of the contradictory but perfectly legal plea of not guilty and not guilty by reason of insanity.

"There is at least some consolation in the fact that the worst is over. Twice-dished dirt has little public interest."

IV

That said editorial and the statements contained therein referred to and were intended by the respondents and each [fol. 18] of them to refer to said action number 70170 and to the defendant found guilty of manslaughter therein and to the verdict of the jury in said action rendered on the 12th day of February, 1938, and to the trial of the issues raised by the plea of the defendant in said action of not guilty by reason of insanity set for February 14, 1938, as aforesaid, and said editorial and the statements contained therein were intended by the respondents and each of them to be understood by persons reading said editorial to refer to said action number 70170 and to the defendant found guilty of manslaughter therein and to the verdict of the jury in said action rendered on the 12th day of February, 1938, and to the trial of the issues raised by the plea of the defendant in said action of not guilty by reason of insanity set for February 14, 1938, as aforesaid.

V

That the statements contained in said editorial and the publishing thereof in said Los Angeles Times as aforesaid were intended by the respondents and each of them and were in and of themselves calculated and had an inherent tendency to:

(1) Interfere with, influence, sway and control the proceedings in said action number 70170 and interfere with, sway, control, embarrass and influence the actions and decisions of the judge who presided at the trial of said action and whose duty it would be to pronounce judgment and sentence upon the defendant if found to be same by the jury therein, and to interfere with, sway, control, embarrass, and influence the actions and decisions of the above entitled court, or any of the judges thereof, in connection with rulings or orders to be made by it or any of said judges on any motions or other proceedings which might legally be [fol. 19] made or taken or prosecuted in said action subsequent to the date of the publication of said editorial.

(2) Interfere with the orderly and due administration of justice in said action.

Count Three

I

That he is the Executive Secretary of Los Angeles Bar Association.

That The Times-Mirror Company is now and at all times herein mentioned was a corporation created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the County of Los Angeles, State of California.

That said The Times-Mirror Company is now and at all times herein mentioned was the publisher of that certain daily newspaper printed, published and circulated at and from the plant and place of business of said The Times-Mirror Company, in the City of Los Angeles, County of Los Angeles, State of California, known as "Los Angeles Times."

That said "Los Angeles Times" has now and at all times herein mentioned had a circulation of over 200,000 copies per day, most of which said copies of said paper are now and at all times mentioned herein were circulated and read in the City of Los Angeles and the County of Los Angeles, State of California.

That Harry Chandler is now and at all times herein mentioned was the president of said The Times-Mirror Company.

That Norman Chandler is now and at all times herein mentioned was the general manager of said The Times-Mirror Company.

[fol. 20] That L. D. Hotchkiss is now and at all times herein mentioned was the managing editor of said Los Angeles Times.

II

That on and before the 14th day of April, 1938, there was pending and undetermined and known to the respondents and each of them to be pending and undetermined in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action entitled "The People of the State of California versus Erwin P. Werner and Helen M. Werner," Criminal Number 69273 in said court, in which said action the defendants and each of them were charged with felony in two counts, to-wit, attempt at grand theft and violating Section 653f of the Penal Code.

That on the 12th day of April, 1938, each of the defendants in said action was found guilty as charged, on both counts, by the jury impaneled in said case, and on said 12th day of April, 1938, the said defendants and each of them gave notice of motion for a new trial, and the judge who presided at the trial of said action set April 22, 1938, as the day and date for passing on said motion for a new trial made on behalf of said defendants and each of them and as the day and date for pronouncing judgment and sentencing the defendants so convicted.

III

That on the said 14th day of April, 1938, the respondents, The Times-Mirror Company, a corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, and each of them, caused to be printed and published and circulated in the City of Los Angeles and elsewhere an issue of said Los Angeles Times; that in said issue of said Los Angeles Times, there was printed and published a certain editorial entitled "The Fall of an Ex-Queen," and which said editorial is in words and figures as follows, to-wit:

[fol. 21] "Politics as we know it is an essentially selfish business, conducted in the main for personal profit of one kind or another. When it is of the boss type, it is apt to be pretty sordid as well Success in boss-ship, which is a denial of public rights, necessarily implies a kind of moral obliquity if not an actually illegal one.

"So that it is something of a contradiction of sense if not of terms to express regret that the political talents of Mrs. Helen Werner were not directed to other objectives than those which, in the twilight of her active life, have brought her and her husband to disgrace. If they had been, she would not have been in politics at all and probably would never have been heard of in a public way Her natural flair was purely political; she would have been miscast in any other sphere of activity.

"Mrs. Werner's primary mistake seems to have been in failing to recognize that her political day was past. For years she enjoyed the unique distinction of being the country's only woman boss—and did she enjoy it! In her heyday she had a finger in every political pie and many were the plums she was able to extract therefrom for those who played ball with her. From small beginnings she utilized

every opportunity to extend her influence and to put office-holders and promising political material under obligations to her. She became a power in the backstage councils of city and county affairs and from that place of strategic advantage reached out to pull the strings on State and legislative offices as well.

"Those were the days when Mrs. Werner was 'Queen Helen' and it is only fair to say that to her the power was much more important than the perquisites. When the inevitable turning of the political wheel brought new figures to the front and new bosses to the back, she found her grip slipping and it was hard to take. The several cases which in recent years have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her onetime influence in high places. That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical. But if there is logic in it, the money meant less to Mrs. Werner than the name of still being a political power, one who could do things with public officials that others could not do. To herself at least she was still Queen Helen."

[fol. 22] IV

That said editorial and the statements contained therein referred to and were intended by the respondents and each of them to refer to said action number 69273 and to the defendant Helen M. Werner found guilty therein and to the verdict of the jury in said action rendered on the 12th day of April, 1938, as aforesaid, and said editorial and the statements contained therein were intended by the respondents and each of them to be understood by persons reading said editorial to refer to said action number 69273 and the defendant Helen M. Werner therein and to the verdict of the jury in said action.

V

That the statements contained in said editorial and the publishing thereof in said Los Angeles Times as aforesaid were intended by the respondents and each of them and were in and of themselves calculated and had an inherent tendency to:

(1) Interfere with, influence, sway and control the proceedings in said action number 69273 and interfere with,

sway, control, embarrass and influence the actions and decisions of the judge who presided at the trial of said action and whose duty it would be to pass upon said motion for a new trial, and in event of its de ial to pronounce judgment and sentence upon the defendants found guilty by the verdict of the jury therein, and to interfere with, sway, control, embarrass, and influence the actions and decisions of said court in connection with rulings or orders to be made by it on any motions or other proceedings which might legally be made or taken or prosecuted subsequent to the conviction of said defendants and the publication of said editorial.

(2) Interfere with the orderly and due administration of justice in said action.

[fol. 23] Count Four

I

That he is the Executive Secretary of Los Angeles Bar Association.

That The Times-Mirror Company is now and at all times herein mentioned was a corporation created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the County of Los Angeles, State of California.

That said The Times-Mirror Company is now and at all times herein mentioned was the publisher of that certain daily newspaper printed, published and circulated at and from the plant and place of business of said The Times-Mirror Company, in the City of Los Angeles, County of Los Angeles, State of California, known as "Los Angeles Times."

That said "Los Angeles Times" has now and at all times herein mentioned had a circulation of over 200,000 copies per day, most of which said copies of said paper are now and at all times mentioned herein were circulated and read in the City of Los Angeles and the County of Los Angeles, State of California.

That Harry Chandler is now and at all times herein mentioned was the president of said The Times-Mirror Company.

That Norman Chandler is now and at all times herein mentioned was the general manager of said The Times-Mirror Company.

That L. D. Hotchkiss is now and at all times herein mentioned was the managing editor of said Los Angeles Times.

II

That on and before the 16th day of April, 1938, there was pending and undetermined and known to the respondents [fol. 24] and each of them to be pending and undetermined in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action entitled "John L. 'Jackie' Coogan versus Arthur L. Bernstein, et al.," Civil number 426945. That said action was brought by plaintiff against his mother and his stepfather to obtain an accounting of money alleged to have been earned by him as a motion picture actor while a minor. That said action was commenced on the 11th day of April, 1938, on which said date plaintiff obtained an order appointing a receiver and a preliminary restraining order and an order to show cause, and on said day the complaint, summons, order appointing a receiver, preliminary restraining order and the order to show cause in said action were served upon the plaintiff's mother and stepfather, defendants in said action, and said order to show cause was pending and undetermined on said 16th day of April, 1938.

III

That on the 16th day of April, 1938, the respondents, The Times-Mirror Company, a corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, and each of them, caused to be printed and published and circulated in the City of Los Angeles and elsewhere an issue of said Los Angeles Times; that in said issue of said Los Angeles Times, there was printed and published a certain editorial entitled "Jackie's Millions," and which said editorial is in words and figures as follows, to-wit:

"The legal principle invoked by the mother and stepfather of Jackie Coogan in the battle over Jackie's earnings as a minor is a very old one. The California statute is a lineal descendant of English common law which held that a child's earnings belong exclusively to its father. Our law has been amended so that father and mother have equal rights in such gains. Whether, in Jackie's case, he should inherit part or all of his deceased father's half of the millions involved will be for the courts to decide.

[fol. 25] "Sound as in abstract principle it may be, the law's first enunciators could hardly have foreseen an era in which it would be possible for a Jackie Coogan to earn, in a few years of little boyhood, many times more than most adults can make in a lifetime. That he should have no right to a penny of these earnings and no more voice in their disposal than a trained dog seems almost as fantastic as the earnings themselves.

"Contrary to the general impression and the apparent belief of parents with talented youngsters, the life of a juvenile film prodigy is not an enviable one. It is cast for the most part in an unnatural and artificial setting, devoid of many of the natural pleasures and companionships of childhood and full of hard work of a character which, since children cannot stay children forever, does little or nothing to fit them for later life. That they should be allowed some compensation for these sacrifices for use when their few years of fleeting fame are over seems only fair. At least it will seem so to the millions to whom the wistful waif who was Jackie Coogan in 'The Kid' gave pleasure."

IV

That said editorial and the statements contained therein referred to and were intended by the respondents and each of them to refer to said action number 426945 and said editorial and the statements contained therein were intended by the respondents and each of them to be understood by persons reading said editorial to refer to said action number 426945.

V

That the statements contained in said editorial and the publishing thereof in said Los Angeles Times as aforesaid were intended by the respondents and each of them and were in and of themselves calculated and had an inherent tendency to:

(1) Interfere with, influence, embarrass, sway and control the actions and decisions of said Superior Court of the State of California, in and for the County of Los Angeles, in connection with said cause or with rulings or orders to be made by it on any motions or other proceedings [fol. 26] then pending or which might legally be made or taken or prosecuted in said action number 426945, subsequent to the publication of said editorial.

(2) Interfere with the orderly and due administration of justice in said action.

Count Five

I

That he is the Executive Secretary of Los Angeles Bar Association.

That The Times-Mirror Company is now and at all times herein mentioned was a corporation created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the County of Los Angeles, State of California.

That said The Times-Mirror Company is now and at all times herein mentioned was the publisher of that certain daily newspaper printed, published and circulated at and from the plant and place of business of said The Times-Mirror Company, in the City of Los Angeles, County of Los Angeles, State of California, known as "Los Angeles Times."

That said "Los Angeles Times" has now and at all times herein mentioned had a circulation of over 200,000 copies per day, most of which said copies of said paper are now and at all times mentioned herein were circulated and read in the City of Los Angeles and the County of Los Angeles, State of California.

That Harry Chandler is now and at all times herein mentioned was the president of said The Times-Mirror Company.

That Norman Chandler is now and at all times herein mentioned was the general manager of said The Times-Mirror Company.

[fol. 27] That L. D. Hotchkiss is now and at all times herein mentioned was the managing editor of said Los Angeles Times.

II

That on and before the 5th day of May, 1938, there was pending and undetermined and known to the respondents and each of them to be pending and undetermined in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action entitled "People of the State of California versus Matthew Shannon and Kennon Holmes," Criminal number 71109 in said court, in

which action the defendants and each of them were charged with a felony, towit, conspiracy to violate Section 245 California Penal Code and assault with a deadly weapon. That on the 22nd day of April, 1938, said defendants in said action were found guilty as charged by the jury impaneled in said case and made application for probation and on the 2nd day of May, 1938, the judge who presided at the trial of said action set June 7, 1938, as the day and date for passing upon the application of the defendants in said action for probation and for pronouncing judgment and sentencing the defendants so convicted.

III

That on the 5th day of May, 1938, the respondents, The Times-Mirror Company, a corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, and each of them, caused to be printed and published and circulated in the City of Los Angeles and elsewhere an issue of said Los Angeles Times; that in said issue of said Los Angeles Times, there was printed and published a certain editorial entitled "Probation for Gorillas?", and which said editorial is in words and figures as follows, towit:

[fol. 28] "Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would

simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

IV

That said editorial and the statements contained therein referred to and were intended by the respondents and each of them to refer to said action number 71109 and to the defendants found guilty therein and to the application of said defendants for probation and to the pronouncing of judgment and the sentencing of said defendants on the 7th day of June, 1938, as aforesaid, and said editorial and the statements contained therein were intended by the respondents and each of them to be understood by persons reading said editorial to refer to said action number 71109 and to the defendants found guilty therein and to the application [fol. 29] of said defendants for probation and to the pronouncing of judgment and sentencing of said defendants on the 7th day of June, 1938, as aforesaid. That "Judge A. A. Scott" referred to in said editorial was at all times herein mentioned a duly appointed, qualified and acting judge of the Superior Court of the State of California, in and for the County of Los Angeles, and was the judge who presided at the trial of said action number 71109 and the judge before whom the application for probation made by the defendants convicted in said action was set for hearing on June 7, 1938, and the judge before whom the matter of pronouncing judgment and sentencing said defendants was set to be heard on June 7, 1938, all of which was known to the respondents and each of them on and before said 5th day of May, 1938.

V

That the statements contained in said editorial and the publishing thereof in said Los Angeles Times as aforesaid were intended by the respondents and each of them and were in and of themselves calculated and had an inherent tendency to:

(1) Interfere with, influence, sway and control the proceedings in said action number 71109 and interfere with,

sway, control, embarrass and influence the actions and decisions of the judge who presided at the trial of said action and whose duty it was to rule upon the application for probation filed by the defendants in said action number 71109 and to pronounce judgment and sentence upon said defendants, and to interfere with, sway, control, embarrass, and influence the actions and decisions of said court in connection with rulings or orders to be made by it on any motions or other proceedings which might legally be made or taken or prosecuted subsequent to the publication of said editorial.

[fols. 30-31] (2) Interfere with the orderly and due administration of justice in said action.

J. Louis Elkins.

Subscribed and sworn to before me this 13 day of May, 1938. Charles E. Beardsley, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

* * * * * * *

[fol. 32] EXHIBIT No. 2

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 428920

In the Matter of THE TIMES-MIRROR COMPANY, a Corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, Respondents, in Contempt.

ORDER TO SHOW CAUSE

Upon reading the affidavit of J. Louis Elkins this day filed herein, and good cause appearing therefrom for this order,

It Is Hereby Ordered that said The Times-Mirror Company, Harry Chandler, Norman Chandler and L. D. Hotchkiss, and each of them, do be, and appear before the above named Superior Court, in Department No. 1 thereof, at the hour of 10 o'clock A. M., on the 23rd day of June, 1938, then and there to show cause, if any there be, why they and

each of them should not be adjudged guilty of contempt of court and punished therefor by reason of the acts and each of the acts set forth in the affidavit of said J. Louis Elkins and alleged to have been committed by them and each of them, reference to said affidavit being hereby made for particulars of the acts charged.

And It Is Further Ordered that this Order to Show Cause and the affidavit of J. Louis Elkins on file herein hereinabove mentioned be served upon said The Times-Mirror Company, Harry Chandler, Norman Chandler, and L. D. [fol. 33] Hotchkiss, and each of them, on or before the 18th day of June, 1938, by delivering a copy of this Order to Show Cause and a copy of said affidavit to said The Times-Mirror Company, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, and each of them, personally.

Dated this 3rd day of June, 1938.

Ruben S. Schmidt, Judge of the Superior Court.

[fol. 34] EXHIBIT No. 3

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 428920

In the Matter of THE TIMES-MIRROR COMPANY, a Corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, Respondents.

DEMURRER

Come now the respondents, and each one thereof joining in the demurrer, and each of said respondents demurs to the Order to Show Cause and the affidavit of J. Louis Elkins on file herein, being the affidavit upon which said Order to Show Cause was issued, and for cause of demurrer alleges:

1. The facts stated in said affidavit do not constitute facts sufficient to authorize the issuance of an order requiring these respondents, or any of them, to show cause why they, or any of them, should not be adjudged guilty of contempt of court and punished therefor.

2. That the facts stated in said affidavit are insufficient to show that the printing, publishing and circulation of the

articles set forth in said affidavit constituted any unlawful interference with the process or proceedings of the above entitled court.

3. That the facts stated in said affidavit are insufficient to show that these respondents, or any of them, are guilty of a contempt of the above entitled court.

4. That the facts stated in said affidavit are insufficient to constitute a contempt of court.

[fol. 35] 5. That said affidavit does not show and the facts stated in said affidavit do not establish that the editorials, or any of them, published as stated in said affidavit were of such a character in their form and substance as to be calculated to or have an inherent tendency to constitute an unlawful interference with the process or proceedings of this court in any of the matters referred to in said affidavit.

6. Said affidavit upon which respondents were cited to show cause why they, and each of them, should not be adjudged guilty of contempt of court and punished therefor by reason of the acts and each of the acts set forth in the affidavit of J. Louis Elkins and alleged to have been committed by them, and each of them, is materially and fatally defective in failing to allege or state that these respondents, and each of them, personally caused or personally permitted the publication of the editorials and each of the editorials set forth in said affidavit.

7. There is a defect of title in said action in that the title should have been "The People of the State of California on the Accusation of J. Louis Elkins v. The Times-Mirror Company, a corporation, Harry Chandler, Norman Chandler and L. D. Hotchkiss."

8. The court is without jurisdiction to proceed because of the absence in said proceeding of the Attorney General of the State of California and/or the District Attorney of the County of Los Angeles and/or the failure of said Attorney General and/or said District Attorney to appear and prosecute said action.

Wherefore, respondents pray that the Order to Show Cause be dismissed, and for such other and further relief as the court may deem proper.

Cosgrove & O'Neil. By T. B. Cosgrove. By F. B. Yoakum, Jr., Attorneys for Respondents.

[fol. 36] EXHIBIT No. 4

"We desire to state for the record that we rely upon the Constitution of the United States and amendment 1, which provides that: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press,'——

"And amendment 14 providing that: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any statement deprive any person of life, liberty, or property, without due process of law;——

"We are not unmindful that in Patterson against Colorado, decided in 1907, 205 U. S. 454, Mr. Justice Holmes in rendering the majority opinion stated that the court left undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First, relating to freedom of speech and freedom of the press. The particular language appears at 462.

"The dissenting opinion of Justice Harlan, page 464, states that the Fourteenth Amendment prohibits the states from restricting the rights of free speech and of free press, and to the same extent that the First Amendment prohibits the United States, by restricting Congressional action. There are several recent decisions holding that the prohibition contained in the First Amendment against Congressional action impinging on freedom of speech and of the press, is also to be found in the Fourteenth Amendment preventing the states from impinging on such rights.

"Calling your attention first to the case of Gitlow v. New York, 268 U. S. 652, the particular language appearing at page 666, a case decided in 1925.

[fol. 37] "And there is a dissenting opinion of Justice Brandeis to the same effect in the case of Whitney v. California, 274 U. S. 357, at page 371, a case decided in 1927, there are the concurring opinions of both Justice Holmes and Justice Brandeis to the same effect.

"In the case of Fiske v. Kansas, case decided in 1927, reported in 274 U. S. at 380, at 382.

"And the case of Stromberg v. California, decided in 1931, and reported in 283, 359, the language appears at 368 and 369.

"In the 274th U. S., the language appears at 382.

"In the case of Ex-parte Near against Minnesota, decided in 1931, reported in 283 U. S. at 697, the decision, and the pages at which the particular language appears, if anyone is interested in it, are 707, 708 and 713 to 716.

"And the case entitled Grosjean against American Press Company, a case decided in 1936, reported in 297 U. S. at page 233, and the language appears at pages 243, 244, 246, 248, and at the bottom of 249, and also on the top of page 250.

"You will find the case entitled Lovell v. City of Griffin, a case decided in 1938, and it is reported in 58 Supreme Court Reports, at 666, and the particular language appears at page 669. I don't have the U. S. official report on that. It wasn't out at the time."

(Pages 94 to 96 of Transcript of Proceedings of July 6, 1938.)

[fol. 38] EXHIBIT NO. 5

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 428920

In the Matter of THE TIMES-MIRROR COMPANY, a Corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, Respondents

ANSWER OF RESPONDENT, THE TIMES-MIRROR COMPANY, A CORPORATION

Comes now the respondent, The Times-Mirror Company, a corporation, upon its own behalf, separating from the other respondents herein, and files this, its answer, to the order to Show Cause in the matter above entitled.

Answer to First Count

To the statements appearing in the First Count of the affidavit of J. Louis Elkins filed herein, respondent, The Times-Mirror Company, a corporation, admits, denies and alleges as follows:

I

Answering Paragraph I thereof, respondent admits the correctness of the statements therein contained.

II

Answering Paragraph II thereof, respondent admits that on and before the 21st day of December, 1937, there was pending in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action entitled "The People of the State of California vs. William Busick, et al.," Criminal No. 67121 in said court, in which said action the defendants and each of them were charged with a felony, [fol. 39] to wit, conspiracy to violate Sections 418 and 594 of the Penal Code of the State of California. Admits that on the 20th day of December, 1937, certain of the defendants in said action were found guilty as charged by the jury impaneled in said case, and on said 20th day of December, 1937, the judge who presided at the trial of said action set December 22nd, 1937, as the day and date for pronouncing judgment and sentencing the defendants so convicted.

Respondent further admits that on and before the 21st day of December, 1937, it knew that a number of persons whose names were unknown to the respondent and who had prior to said 21st day of December, 1937, been employed in the Douglas airplan plant at Santa Monica and who were said to have participated in a "sit-down" strike at said plant were being prosecuted in the courts of Los Angeles County by the District Attorney of Los Angeles County.

Respondent denies generally all of the statements of said Paragraph II not herein specifically admitted.

III

Answering Paragraph III thereof, respondent admits that on the 21st day of December, 1937, this respondent, The Times-Mirror Company, a corporation, caused to be printed and published and circulated in the City of Los Angeles, and elsewhere, an issue of the Los Angeles Times; and further admits that in said issue of said Los Angeles Times there was printed and published a certain editorial entitled "Sit-Strikers Convicted," which said editorial is in the words and figures as set forth in said Paragraph III.

Respondent denies generally all of the statements of Paragraph III not herein specifically admitted.

[fol. 40] Further answering said Paragraph III, this respondent alleges that the editorial entitled "Sit-Strikers Convicted," published in the Los Angeles Times under date of December 21, 1937, first came to the notice and attention

of the officers and directors of this respondent corporation subsequent to said publication and that prior thereto no officer or director of this respondent corporation had been consulted concerning said editorial and no officer or director of this respondent corporation knew anything concerning the preparation or the contents of said article and had no information that said article was being prepared for publication.

IV

Answering Paragraph IV thereof, respondent admits that said editorial and the statements contained therein referred to said action No. 67121 and to the defendants found guilty therein and to the verdict of the jury in said action rendered on the 20th day of December, 1937, and admits that said editorial and the statements contained therein were intended to be understood by persons reading said editorial to refer to said action numbered 67121 and to the defendants therein and to the verdict of the jury in said action.

Respondent denies generally all of the statements of Paragraph IV not herein specifically admitted.

V

Answering Paragraph V thereof, respondent denies generally and specifically each and every statement therein contained.

Answer to Third Count

To the statements appearing in the Third Count of the affidavit of J. Louis Elkins filed herein, respondent, The Times-Mirror Company admits, denies and alleges as follows:

[fol. 41] I

Answering Paragraph I thereof, respondent admits the correctness of the statements therein contained.

II

Answering Paragraph II thereof, respondent admits that on and before the 14th day of April, 1938, there was pending in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action entitled "The People of the State of California vs. Erwin P. Werner and Helen M. Werner," Criminal No. 69273 in said court, in

which said action the defendants and each of them were charged with a felony in two counts, to-wit, attempt at grand theft and violating Section 653 (f) of the Penal Code. Admits that on the 12th day of April, 1938, each of the defendants in said action was found guilty as charged on both counts by the jury impaneled in said case, and on said 12th day of April, 1938, the said defendants and each of them gave notice of motion for a new trial and the judge who presided at the trial of said action set April 22nd, 1938, as the day and date for passing on said motion for a new trial made on behalf of said defendants and each of them and as the day and date for pronouncing judgment and sentencing the defendants so convicted.

Respondent further admits that on and before the 14th day of April, 1938, it knew that there was pending in the Superior Court of the State of California, in and for the County of Los Angeles, a certain criminal action in which Erwin P. Werner and Helen M. Werner were defendants, and in which action said defendants were charged with a felony.

Respondent denies generally all of the statements of Paragraph II not herein specifically admitted.

[fol. 42] III

Answering Paragraph III thereof, respondent admits that on the 14th day of April, 1938, this respondent, The Times-Mirror Company, caused to be printed and published and circulated in the City of Los Angeles, and elsewhere, an issue of the Los Angeles Times; further admits that in said issue of said Los Angeles Times there was printed and published a certain editorial entitled "The Fall of an Ex-Queen," which said editorial is in the words and figures as set forth in said Paragraph III.

Respondent denies generally all of the statements of Paragraph III not herein specifically admitted.

Further answering said Paragraph III, this respondent alleges that the editorial entitled "The Fall of an Ex-Queen," published in the Los Angeles Times under date of April 14th, 1938, first came to the notice and attention of the officers and directors of this respondent corporation subsequent to said publication, and that prior thereto no officer or director of this respondent corporation had been consulted concerning said editorial and no officer or director

of this respondent corporation knew anything concerning the preparation or the contents of said article and had no information that said article was being prepared for publication.

IV

Answering Paragraph IV thereof, respondent admits that said editorial and the statements contained therein referred to said action numbered 69273 and to the defendant Helen M. Werner found guilty therein and to the verdict of the jury in said action rendered on the 12th day of April, 1938, as aforesaid, and said editorial and the statements contained therein were intended to be understood by persons reading said editorial to refer to said action numbered [fol. 43] 69273 and to the defendant Helen M. Werner therein and to the verdict of the jury in said action.

Respondent denies generally all of the statements of Paragraph IV not herein specifically admitted.

V

Answering Paragraph V thereof, respondent denies generally and specifically each and every statement therein contained.

Answer to Fifth Count

To the statements appearing in the Fifth Count of the affidavit of J. Louis Elkins filed herein, respondent, The Times-Mirror Company, admits, denies and alleges as follows:

I

Answering Paragraph I thereof, respondent admits the correctness of the statements therein contained.

II

Answering Paragraph II thereof, respondent admits that on and before the 5th day of May, 1938, there was pending in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action entitled "The People of the State of California vs. Matthew Shannon and Kennon Holmes," Criminal No. 71109 in said court, in

which action the defendants and each of them were charged with a felony, to wit, conspiracy to violate Section 245 of the California Penal Code and assault with a deadly weapon. Admits that on the 22nd day of April, 1938, said defendants in said action were found guilty as charged by the jury impaneled in said case and made application for probation and on the 2nd day of May, 1938, the judge who presided at the trial of said action set June 7th, 1938, as the day and date for passing upon the application of the defendants [fol. 44] in said action for probation and for pronouncing judgment and sentencing the defendants so convicted.

Respondent further admits that on and before the 5th day of May, 1938, it knew that certain persons whose names were unknown to this respondent had been arrested upon the charge of having assaulted non-union truck drivers and were being prosecuted in the courts of Los Angeles County by the District Attorney of Los Angeles County.

Respondent denies generally all of the statements of said Paragraph II not herein specifically admitted.

III

Answering Paragraph III thereof, respondent admits that on the 5th day of May, 1938, this respondent, The Times-Mirror Company, a corporation, caused to be printed and published and circulated in the City of Los Angeles, and elsewhere, an issue of the Los Angeles Times; further admits that in said issue of said Los Angeles Times there was printed and published a certain editorial entitled "Probation for Gorillas?" which said editorial is in the words and figures as set forth in said Paragraph III.

Respondent denies generally all of the statements of Paragraph III not herein specifically admitted.

Further answering said Paragraph III, this respondent alleges that the editorial entitled "Probation for Gorillas?", published in the Los Angeles Times under date of May 5th, 1938, first came to the notice and attention of the officers and directors of this respondent corporation subsequent to said publication and that prior thereto no officer or director of this respondent corporation had been consulted concerning said editorial and no officer or director of this respondent corporation knew anything concerning

the preparation or the contents of said article and had no information that said article was being prepared for publication.

[fol. 45] IV

Answering Paragraph IV thereof, respondent admits that said editorial and the statements contained therein referred to said action No. 71109 and to the defendants found guilty therein and to the application of said defendants for probation on the 7th day of June, 1938, and admits that said editorial and the statements contained therein were intended to be understood by persons reading said editorial to refer to said action No. 71109 and to the defendants found guilty therein and to the application of said defendants for probation on the 7th day of June, 1938; further admits that "Judge A. A. Scott" referred to in said editorial was at all times mentioned in said Paragraph IV a duly appointed, qualified and acting judge of the Superior Court of the State of California, in and for the County of Los Angeles, and was the judge who presided at the trial of said action No. 71109 and the judge before whom the application for probation made by the defendants convicted in said action was set for hearing on June 7th, 1938, and the judge before whom the matter of pronouncing judgment and sentencing said defendants was set to be heard on June 7th, 1938.

Respondent denies generally all of the statements of Paragraph IV not herein specifically admitted.

V

Answering Paragraph V thereof, respondent denies generally and specifically each and every statement therein contained.

Wherefore, respondent, having fully answered said Order to Show Cause, prays that the same be dismissed, and for such other and further relief as the court may deem proper.

Cosgrove & O'Neil, by T. B. Cosgrove, by F. B. Yoakum, Jr., Attorneys for Respondent, The Times-Mirror Company, a Corp.

[fols. 46-64] *Duly sworn to by H. E. Downing. Jurat omitted in printing.*

[fol. 65] EXHIBIT No. 8

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 428920

In the Matter of THE TIMES-MIRROR COMPANY, a Corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, Respondents

Answer of Respondent L. D. Hotchkiss

Comes now the respondent L. D. Hotchkiss, upon his own behalf, separating from the other respondents herein, and files this, his answer to the Order to Show Cause in the matter as above entitled.

Answer to First Count

To the statements appearing in the First Count of the affidavit of J. Louis Elkins filed herein, respondent L. D. Hotchkiss admits, denies and alleges as follows:

I

Answering Paragraph I thereof, respondent admits the correctness of the statements therein contained.

II

Answering Paragraph II thereof, respondent admits that on and before the 21st day of December, 1937, there was pending in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action entitled "The People of the State of California vs. William Busick, et al.," Criminal No. 67121, in said court, in which said action the defendants and each of them were charged with a felony, to wit, conspiracy to violate Sections 418 and [fol. 66] 594 of the Penal Code of the State of California. Admits that on the 20th day of December, 1937, certain of the defendants in said action were found guilty as charged by the jury impaneled in said case, and on said 20th day of December, 1937, the judge who presided at the trial of said action set December 22nd, 1937, as the day and date for pronouncing judgment and sentencing the defendants so convicted.

Respondent further admits that on and before the 21st day of December, 1937, he knew that a number of persons whose names were unknown to the respondent and who had prior to said 21st day of December, 1937, been employed in the Douglas airplane plant at Santa Monica, California, and who were said to have participated in a "sit-down" strike at said plant, were being prosecuted in the courts of Los Angeles County by the District Attorney of Los Angeles County.

Respondent denies generally all of the statements of said Paragraph II not herein specifically admitted.

III

Answering Paragraph III thereof, respondent admits that on the 21st day of December, 1937, the respondent The Times-Mirror Company, a corporation, caused to be printed and published and circulated in the City of Los Angeles, and elsewhere, an issue of the Los Angeles Times; further admits that in said issue of said Los Angeles Times there was printed and published a certain editorial entitled "Sit-Strikers Convicted," which said editorial is in the words and figures as set forth in said Paragraph III.

Respondent denies generally all of the statements of Paragraph III not herein specifically admitted.

[fol. 67]

IV

Answering Paragraph IV thereof, respondent admits that said editorial and the statements contained therein referred to said action No. 67121 and to the defendants found guilty therein and to the verdict of the jury in said action rendered on the 29th day of December, 1937, and admits that said editorial and the statements contained therein were intended to be understood by persons reading said editorial to refer to said action No. 67121 and to the defendants therein and to the verdict of the jury in said action.

Respondent denies generally all of the statements of Paragraph IV not herein specifically admitted.

V

Answering Paragraph V thereof, respondent denies generally and specifically each and every statement therein contained.

Answer to Third Count

To the statements appearing in the Third Count of the affidavit of J. Louis Elkins filed herein, respondent L. D. Hotchkiss admits, denies and alleges as follows:

I

Answering Paragraph I thereof, respondent admits the correctness of the statements therein contained.

II

Answering Paragraph II thereof, respondent admits that on and before the 14th day of April, 1938, there was pending in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action, entitled "The People of the State of California vs. Erwin P. Werner [fol. 68] and Helen M. Werner," Criminal No. 69273, in said court, in which said action the defendants and each of them were charged with a felony in two counts, to wit, attempt at grand theft and violating Section 653 (f) of the Penal Code. Admits that on the 12th day of April, 1938, each of the defendants in said action was found guilty, as charged, on both counts by the jury impaneled in said case, and on said 12th day of April, 1938, the said defendants and each of them gave notice of motion for a new trial, and the judge who presided at the trial of said action set April 22, 1938, as the day and date for passing on said motion for a new trial made on behalf of said defendants and each of them, and as the day and date for pronouncing judgment and sentencing the defendants so convicted.

Respondent further admits that on and before the 14th day of April, 1938, he knew that there was pending in the Superior Court of the State of California, in and for the County of Los Angeles, a certain criminal action in which Erwin P. Werner and Helen M. Werner were defendants, and in which action said defendants were charged with a felony.

Respondent denies generally all of the statements of Paragraph II not herein specifically admitted.

III

Answering Paragraph III thereof, respondent admits that on the 14th day of April, 1938, the respondent The

Times-Mirror Company caused to be printed and published and circulated in the City of Los Angeles, and elsewhere, an issue of the Los Angeles Times; further admits that in said issue of said Los Angeles Times there was printed and published a certain editorial entitled, "The Fall of an Ex-Queen," which said editorial is in the words and figures as set forth in said Paragraph III.

[fol. 69] Respondent denies generally all of the statements of Paragraph III not herein specifically admitted.

Further answering said Paragraph III, this respondent alleges that the editorial entitled, "The Fall of an Ex-Queen," published in the Los Angeles Times under date of April 14, 1938, first came to his notice and attention subsequent to said publication, and that prior thereto this respondent had not been consulted concerning said editorial, knew nothing of its preparation or the contents of the article, and had no information that said article was being prepared for publication.

IV

Answering Paragraph IV thereof, respondent admits that said editorial and the statements contained therein referred to said action numbered 69273 and to the defendant Helen M. Werner, found guilty therein, and to the verdict of the jury in said action returned on the 12th day of April, 1938, as aforesaid, and said editorial and the statements contained therein were intended to be understood by persons reading said editorial to refer to said action numbered 69273 and the defendant Helen M. Werner therein and to the verdict of the jury in said action.

Respondent denies generally all of the statements of Paragraph IV not herein specifically admitted.

V

Answering Paragraph V thereof, respondent denies generally and specifically each and every statement therein contained.

Answer to Fifth Count

To the statements appearing in the Fifth Count of the affidavit of J. Louis Elkins filed herein, respondent L. D. Hotchkiss admits, denies and alleges as follows:

[fol. 70] I

Answering Paragraph I thereof, respondent admits the correctness of the statement therein contained.

II

Answering Paragraph II thereof, respondent admits that on and before the 5th day of May, 1938, there was pending in the Superior Court of the State of California, in and for the County of Los Angeles, a certain action entitled, "People of the State of California vs. Matthew Shannon and Kennon Holmes," Criminal No. 71109, in said court, in which action the defendants and each of them were charged with a felony, to wit, conspiracy to violate Section 245, California Penal Code, and assault with a deadly weapon. Admits that on the 22nd day of April, 1938, said defendants in said action were found guilty as charged by the jury impaneled in said case and made application for probation, and on the 2nd day of May, 1938, the judge who presided at the trial of said action set June 7, 1938, as the day and date for passing upon the application of the defendants in said action for probation, and for pronouncing judgment and sentencing the defendants so convicted.

Respondent further admits that on and before the 5th day of May, 1938, he knew that certain persons whose names were unknown to the respondent had been arrested upon the charge of having assaulted non-union truck drivers and were being prosecuted in the courts of Los Angeles County by the District Attorney of Los Angeles County.

Respondent denies generally all of the statements of said Paragraph II not herein specifically admitted.

[fol. 71] III

Answering Paragraph III thereof, respondent admits that on the 5th day of May, 1938, the respondent The Times-Mirror Company, a corporation, caused to be printed and published and circulated in the City of Los Angeles, and elsewhere, an issue of the Los Angeles Times; further admits that in said issue of said Los Angeles Times there was printed and published a certain editorial entitled, "Probation for Gorillas?", which said editorial is in the words and figures as set forth in said Paragraph III.

Respondent denies generally all of the statements of Paragraph III not herein specifically admitted.

Further answering said Paragraph III, this respondent alleges that the editorial entitled, "Probation for Gorillas?", published in the Los Angeles Times under date of May 5, 1938, first came to his notice and attention subsequent to said publication, and that prior thereto this respondent had not been consulted concerning said editorial, knew nothing of the preparation or the contents of the article and had no information that said article was being prepared for publication.

IV

Answering Paragraph IV thereof, respondent admits that said editorial and the statements contained therein referred to said action No. 71109 and to the defendants found guilty therein and to the application of said defendants for probation on the 7th day of June, 1938, and admits that said editorial and the statements contained therein were intended to be understood by persons reading said editorial to refer to said action No. 71109 and to the defendants found guilty therein and to the application of said defendants for probation on the 7th day of June, 1938. Further admits that [fol. 72] "Judge A. A. Scott", referred to in said editorial, was at all times mentioned in said Paragraph IV a duly appointed, qualified and acting judge of the Superior Court of the State of California, in and for the County of Los Angeles, and was the judge who presided at the trial of said action No. 71109, and the judge before whom the application for probation, made by the defendants convicted in said action, was set for hearing on June 7, 1938, and the judge before whom the matter of pronouncing judgment and sentencing said defendants was set to be heard on June 7, 1938.

Respondent denies generally all of the statements of Paragraph IV not herein specifically admitted.

V

Answering Paragraph V thereof, respondent denies generally and specifically each and every statement therein contained.

Wherefore, respondent having fully answered said Order to Show Cause, prays that the same be dismissed, and for such other and further relief as the court may deem proper.

Cosgrove & O'Neil, by T. B. Cosgrove, by F. B. Yoakum, Jr., Attorneys for Respondent, L. D. Hotchkis.

[fol. 73] *Duly sworn to by L. D. Hotchkiss. Jurat omitted in printing.*

[fol. 74] EXHIBIT No. 9

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 428920

In the Matter of THE TIMES-MIRROR COMPANY, a Corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, Respondents

AFFIDAVIT UPON ORDER TO SHOW CAUSE

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Harry Chandler, being first duly sworn, deposes and says:

I am one of the respondents named in the Order to Show Cause in the matter as above entitled and make this affidavit upon behalf of myself and each of the other respondents named.

I am a resident of the City of Los Angeles, County of Los Angeles, State of California, of the age of seventy-four years, and during the past approximately fifty-three years have been connected continuously with the circulation and publication of the Los Angeles Times. During this period I have been engaged in various capacities, from carrying the Los Angeles Times on newspaper routes to the position which I now occupy as President of The Times-Mirror Company, a corporation, the publisher of the said Los Angeles Times. With the editorial policy of the Los Angeles Times I have been intimately familiar and have contributed greatly to the shaping of said policies during the past approximately thirty years.

[fol. 75] For approximately fifty years the Los Angeles Times has been the principal newspaper exponent in the United States of the open shop system of industrial relations.

The open shop system advocated by the Los Angeles Times may be defined as that industrial policy which demands and upholds an equality of rights for employers and employees, individually and collectively, and the equal protection of their liberties and interests. It declares it to be the right and privilege of every wage-earner to join or not to join a labor organization, as he may personally choose, without coercion from any source nor penalty for his choice. It upholds his right to work as he individually sees fit, for whom, for what wages and under what conditions. It upholds his right to earn as much as his individual capabilities make possible and to keep all he earns, without arbitrary or involuntary deductions for the support of a labor organization with whose purposes he is not in sympathy. It upholds the right of workers in groups to organize, to bargain collectively for their own benefit, to strike against unsatisfactory wages or working conditions and otherwise to act jointly for the protection and advancement of their own interests, provided that such activities are lawful, noncoercive and include no trespass upon the rights of others.

The open shop policy declares and upholds the right of employers to employ and to discharge workers on the basis of individual merit and capability without regard to whether they are or are not members of a labor organization. It upholds the right of an employer to conduct his business as he sees fit, without dictation or coercion from any source, provided that such conduct is lawful and that wage and [fol. 76] working conditions are as favorable to employees as the condition of the business may permit. It upholds his right to operate on an economic basis and with continuity of production, free from unfair or unreasonable interruption and interference.

The open shop policy denies the right of either employers or employees to serve or seek to serve their personal ends by coercive or unlawful means. It opposes oppressive combinations of capital equally with oppressive combinations of labor. It endorses and supports the fair and orderly adjudication and arbitration of labor disputes from whatever source invoked.

In pursuance of and support of this policy, The Times has long and consistently defended freedom in industry for employers and employees alike and has opposed the efforts of any to destroy or to curtail that freedom. It has resisted to the extent of its ability and, on occasion, at great cost to itself in the lives of employees and in property damage, attempts to establish within its sphere of influence conditions inimical to that policy. It has done everything in its power to establish and to maintain the open shop principle as the industrial principle of Los Angeles and Southern California. It believes and has frequently declared that the unprecedented growth and development of this community in population and industries has been in large part due to that policy, one which has rendered it relatively exempt from frequent and destructive labor wars and which has advertised it throughout the country as a community desirable alike to industry and to wage-earners.

By virtue of its deep convictions on the subject and the many hundreds of editorial expressions thereof which it has published over the past half-century, The Times has become thoroughly identified in the public mind with the open shop policy. The vigor and determination of its sup- [fol. 77] port of this system of industrial relations and of its opposition to everything hostile thereto have made it a leader of community thought and action in matters wherein the welfare of such relations is involved. To a very large extent, the duty and responsibility of maintaining and defending, through the medium of informed public opinion, the principle of industrial freedom against the many attacks which have been and are being made upon it have devolved upon The Times. That duty and responsibility it has welcomed. To my knowledge and belief it has never failed to fulfill them to the best of its ability and at no matter what sacrifice to itself. For the Los Angeles Times to fail outspokenly to support this principle or by silence to condone attacks upon it would be to contradict and disavow a policy ingrained in and integral to itself and to the community for which it is privileged and expected to speak.

The occasions on which The Times has been thus called upon to support and defend the open shop and to denounce its enemies have been many. Over the years numerous well-organized, well-planned and well-financed efforts have been made to dislodge the open shop system in the industries of this community and to substitute for it the closed shop, a

system which is in all essential respects its opposite. Many if not most of these efforts have been accompanied by sabotage, violence, terrorism and other unlawful activities on the part of such closed-shop proponents, activities ranging from the dynamiting of open shop establishments, with accompanying loss of life, to intimidation of and felonious assaults upon non-union wage-earners. These activities [fol. 78] have been factually reported in the news columns of The Times and their illegal, destructive and peace-disturbing character editorially pointed out and commented upon. In these editorials The Times has consistently advocated and upheld the rule of law and order, applauded those who have endeavored to maintain it and has denounced and demanded appropriate punishment for those who would break it down.

Within the past two years a new offensive weapon has been adopted by advocates of the complete unionization of industry, essential principle of the closed shop. This is the illegal seizure and occupation of property by so-called sit-down strikes. The first instance of this of which The Times has record occurred on or about November 29, 1936, when 1200 employees of the Midland Steel Company, Detroit, dropped their tools and stopped their machines but continued to occupy their working quarters, refusing to vacate pending the outcome of negotiations between their union, the United Automobile Workers, and company officials. Members of the same union started a sit-down strike in the Detroit plants of the Kelsey-Hayes Company on December 23, 1936, and on December 28th they halted by similar means operations in the Fisher Body Company plant of General Motors Corporation at Cleveland. Out of this grew the 42-day General Motors strike, the first important one of the sit-down variety in the United States. It caused a practically complete suspension of the company's operations in Cleveland, Detroit, Flint, Michigan, and elsewhere, and the unemployment of more than 100,000 men. The strikers refused to obey repeated court orders to vacate the property illegally seized. Rioting at Flint between strikers and the police and members of the National Guard resulted in injuries [fol. 79] to a police officer and two pickets. The strike ended on February 11, 1937, when an agreement was reached between company officials and those of the union.

On March 8, 1937, members of the United Automobile Workers launched a sit-down strike in the eight Detroit

plants of the Chrysler Corporation. On March 19th the Sheriff of Wayne County, in which Detroit is located, sought to arrest some six thousand of the strikers for illegal possession of property but was prevented by action of Governor Frank Murphy. On March 24th, the plants were evacuated by order of John L. Lewis, head of the Committee for Industrial Organization, with which the United Automobile Workers are affiliated. The strike ended April 6th by agreement between Lewis and Walter Chrysler. This strike lasted thirty days, during which time 60,000 men were unemployed as a result. On the following day sit-down strikes in the Reo and Hudson plants were similarly ended by agreement.

Other sit-down strikes in progress during February were the Briggs Manufacturing Co., Detroit; Detrola Radio plant, Detroit; Fry Products Company, Detroit; H. & H. Tube Co., and the Yale & Towne Lock Co.; Wood Manufacturing Co., Detroit; Arvey Corporation, Detroit; Star Transfer Co., Detroit and Timken Detroit Axle Co., Detroit; Electric Boat Company, Groton, Connecticut; Crowell Publishing Co., pressmen, Springfield, O[illegible], and Fansteel Metallurgical Corp., Springfield, Illinois.

On February 23, 1937, approximately 400 members of the United Automobile Workers started a sit-down strike in the Santa Monica plant of the Douglas Aircraft Company, Inc., as part of an effort to "organize" the several thousand [fol. 80] employees of the company as part of the U. A. W., though members of this organization, a Committee for Industrial Organization affiliate, comprised only a comparatively small minority of the plant's total worker personnel. The strikers were warned that the company was engaged on contracts for the United States government but they refused to evacuate. On February 25th Los Angeles County Sheriff's officers, armed with warrants predicated on grand jury indictments charging the strikers with criminal conspiracy, broke into the plant and arrested 394 sit-downers. At about the same time some one hundred members of the same organization attempted similarly to seize the plant of the Northrop Corporation, a Douglas affiliate, by a sit-down strike. A representative of the District Attorney's office gave them an hour to evacuate or face grand jury action. They evacuated.

On or about February 25, 1937, Homer Martin, president of the United Automobile Workers, was quoted in press

dispatches from New York as having said in connection with the Douglas strike:

"Anti-labor tactics are not conducive to the building of good, safe planes. I'd hate awful bad to lose a wing because some worker thought he was getting a bad deal from his employer. If Douglas expects people to ride in his planes with any real sense of safety he must be sure of the good will of his employees."

On March 11th the Douglas strikers voted to return to work after Donald Douglas, president of the company, had agreed to reinstate 297 of them. On May 11th, the cases of all but twenty-four of the sit-strikers arrested at Santa Monica were dismissed by Superior Judge Bishop. Two other cases were later dismissed. In the first trial of the [fol. 81] remainder, ending July 2nd, the jury disagreed. The second trial began October 14, 1937, in the local Superior Court. On December 20th the jury found the twenty-two guilty of felonious conspiracy forcibly to enter and detain the Douglas plant and of committing malicious mischief. On December 29th William Busick and Andrew Schmolder, C. I. O. organizers and ringleaders of the strike, were fined $600.00 each with the alternative of two hundred days in jail. Eight members of the strike committee were fined $300.00 each with the alternative of 100-day jail sentences. The twelve others got $150.00 fines apiece or fifty days in jail.

Following the Douglas case convictions, sit-down strikes became infrequent and unpopular. They were generally condemned by the courts, by public officials and even by some labor leaders. Secretary of Labor Perkins, originally inclined to defend them, later admitted their illegality. The Third United States Court of Appeals held illegal a sit-down strike in the Apex Hosiery Company plant at Philadelphia and the United States Supreme Court declined to review the case.

Throughout the period of sit-down strikes The Times commented on them frequently and vigorously, taking the position that such efforts constituted illegal trespass upon and seizure for ransom of private property, to be treated as such. It applauded the action of authorities here and elsewhere so to deal with them and declared in an editorial published December 21, 1937, on the convictions in the Doug-

las case, that Los Angeles is to be congratulated on the possession of law enforcement officers, courts and juries able and determined to do their duty.

[fol. 82] In the course of this editorial, which is one of those complained of as having been in contempt of court, The Times referred to the verdict as notice that Los Angeles is aroused to the danger of "davebeckism" and that no form of labor terrorism will be tolerated here. It said further that the convictions might have a good deal to do with sending Dave Beck back to Seattle.

Dave Beck is international representative of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, commonly known as the Teamsters Union and now largely composed of drivers of trucks and other motor vehicles used for commercial purposes. His union jurisdiction comprises the eleven western States and western Canada His headquarters are in Seattle. Due to his extensive political and industrial influence, he has been frequently referred to as the "labor boss of Seattle." He acquired his present title in 1926 and his present jurisdiction in 1936.

Beck collaborated with the American Newspaper Guild in the strike which suspended publication of the Seattle Post-Intelligencer from August 14 to November 26, 1936, members of the Teamsters' Union acting as pickets and otherwise making it impracticable for the newspaper, Seattle's oldest daily, to publish.

Through his control of motor transportation and by reason of the sympathy and support of the late John F. Dore, until recently mayor of Seattle, Beck has become virtual political and industrial dictator of the Puget Sound territory. He has been able to close wholesale supply houses, shut down the lumber industry, close public highways to farmers, halt the import of raw materials and merchandise to manufacturers and merchants and stop deliveries to cus-[fol. 83] tomers. He has forced service industries to organize under his auspices and to pay a set percentage of their receipts to "administrators" named by him. This tribute ranges from three per cent for laundries, cleaners and dyers to $5.00 for every new automobile sold, with varying imposts on milk, bread and other foods, fuel and other household necessities. Some of the methods by which this situation has been brought about are described as follows in a series of articles by George W. Lynn and pub-

lished beginning March 11, 1938, in the Los Angeles Evening Herald and Express under the title "Seattle's Struggle: The Rise and Fall of Government of Violence":

"Seattle's story is typical of the entire northwest situation. It is a story of terrorism, destruction, wanton attacks and bewilderment to hundreds of thousands of people within the borders of this city and the State of Washington—all in the name of labor. * * * These plug-uglies, these gangsters and these beef squads have kept Seattle in terrorism for years. They have beaten up innocent citizens, overturned trucks, bombed places of business, thrown acid on materials and defied the law. They have destroyed confidence, they have destroyed business and they have made a mockery of law and order."

From Seattle and San Francisco, where the Teamsters' Union is similarly powerful, Beck endeavored early this year to extend his domination to the industrial area surrounding Portland, Oregon, by methods like those employed in Seattle. In Oregon these methods were strongly opposed to Governor Martin and the Portland authorities, with the result that to date approximately one hundred union members, including several of Beck's lieutenants, have been indicted, arrested, jailed or all three. Many of these have confessed or pleaded guilty in court to criminal acts ranging from assault and truck wrecking to arson and bombings. In connection with one of the latter, the Portland Oregonian said editorially:

[fol. 84] "It is clear from the confessions that a union official hired the Salem box factory (an open shop establishment) arsonists, that he obtained them through the agency of a union Teamsters' hiring hall and that they were paid $105 for setting a $60,000 fire."

Beck and his representatives have frequently threatened and endeavored to bring the Los Angeles industrial area under the control of the Teamsters' Union. On February 7, 1937, for example, Mayor Dore said at a public meeting in Los Angeles:

"The Seattle Teamsters' political party has made my city nearly 100 per cent union—the same as Los Angeles will be in the next couple of years."

Subsequent to this and other similar threats against the industrial liberty of this community, the Los Angeles Times published a series of brief, front-page articles under the continuing title "Progress in the Northwest." Each of these articles described some phase of the business and industrial situation in the Beck-dominated area of the northwest and the manner in which individual enterprises and industries have suffered by reason of such domination. These articles, beginning October 22 and concluding December 31, 1937, were published for the purpose of informing Times readers of what might be expected should the threat of "davebeckism" become a reality in this area.

In pursuance of that threat, the Teamsters' Union has made numerous efforts to organize and control the motor transportation industry of Los Angeles and its environs and various industries dependent upon motor transport. Among the latter are the baking and bread industry, the production and distribution of milk and other farm and dairy products, the distribution of beer and other enterprises involving the extensive employment of trucks and [fol. 85] truck drivers. In numerous instances these activities have been accompanied by sabotage, assaults and other violence to open shop property and non-union wage-earners. In December, 1937, at the peak of the Christmas shopping period, the union undertook by threats, violence and extensive picketing to organize the delivery systems of Los Angeles down town stores and to prevent the delivery of purchased merchandise to Los Angeles residences. On December 13 the May Company, one of the stores involved, applied to the Superior Court for an injunction against such activities. After a hearing featured by evidence of harassment, coercion, intimidation, assaults and other violence upon non-union store employees, Judge Kincaid on December 28 granted a permanent injunction restraining the Teamsters' Union and affiliates from such practices.

The local courts have taken judicial notice of the activities of the Teamsters' Union in other instances. On February 23, 1938, in the United States District Court sitting at Los Angeles an injunction was granted restraining the union from interfering with the peaceful relationship existing between the Brewery Workers' Union and California brewers, this case arising in connection with the effort of the Teamsters' Union to acquire control of the beer-

trucking industry as mentioned above. In his address to the court, summarizing the case for the Brewery Workers' Union which he represented, Saul S. Klein, veteran union labor attorney, said:

"The Teamsters' Union wants control of every driver on all highways so it can control the country's distribution system. * * * Dave Beck is not interested in labor. He's only interested in dues and assessments. * * * He is not only an enemy to labor but an enemy to society. It would be outrageous to have a man like this be a dictator of American labor."

[fol. 86] In handing down his decision, the Federal Court Judge announced from the bench:

"I feel that injunctive relief must be allowed to preserve the right of the brewers to continue their business and to insure them that so long as they deal with their actual workers on matters pertaining to their employment, they may be relieved from attacks such as are alleged and are shown to have been made by the Brotherhood of Teamsters."

On April 22, 1938, following an investigation of terroristic activities, the Los Angeles County grand jury returned felony indictments charging assault, extortion and conspiracy against eleven members of the Los Angeles unit of the Teamsters' Union, including its president, Dexter L. Lewis, Harry W. Dail, general organizer for the International Teamsters' Union and known as Beck's local representative, Thomas L. Pitts, secretary-treasurer of the Grocery Drivers' affiliate of the union, and eight others. The indictments listed a series of assaults, beatings, strike threats against trucking operators and extortion of money under threat of strike. In a statement issued after the return of the indictments, District Attorney Fitts said he expected further revelations of labor terrorism as a result of the grand jury's action.

On the same day, April 22, 1938, Matthew Shannon and Keenan Holmes, two members of the Teamsters' Union, were convicted by a jury in the local Superior Courts of felonious assault upon non-union truck drivers employed

by a downtown Los Angeles store involved in the Christmas-season organizing effort of the union hereinbefore described. The evidence disclosed several instances in which the defendants, described as "goon squad" members, fired steel ball-bearings from sling-shots at truck drivers and guards, injuring one of the former and causing an accident to a truck in which a guard was hurt.

[fol. 87] After their conviction on two counts of assault with a deadly weapon and one of conspiracy, Shannon and Holmes made application for probation. On May 5, The Times published an editorial vigorously opposing the granting of probation. In this editorial it said in effect that, in the interests of society and of community safety, men who commit such acts of terrorism, particularly when for pay, should be severely punished.

In the publication of this editorial The Times acted upon its knowledge of the fact that it is and long has been an established practice in probation matters for those in charge thereof to invite informed opinion on the question of whether or not probation should be granted. The Times is aware of the custom of probation officers to send out numerous requests for expressions of such opinion from those believed to be qualified by observation and otherwise to give it. In one recent probation case The Times was advised by a former presiding Los Angeles Superior Court judge that a criticism of probation, published subsequent to its granting, should have been made known while the matter was pending instead of afterward.

By reason of its many years of study and observation of labor controversies and of criminal activities which have frequently characterized them, The Times believes itself to be qualified to give an informed opinion on matters such as that involved in the probation matter above mentioned. It was in that belief and in an effort disinterestedly to serve what it conceives to be the best interests of this community that the editorial in question was prepared and published.

Further affiant sayeth not.

Harry Chandler.

Subscribed and sworn to before me this 28th day of June, 1938. C. O. Denning, Notary Public in and for the County of Los Angeles, State of California. (Notarial Seal.)

[fol. 88] EXHIBIT No. 10

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 428920

In the Matter of THE TIMES-MIRROR COMPANY, a Corporation, HARRY CHANDLER, NORMAN CHANDLER, and L. D. HOTCHKISS, Respondents

AFFIDAVIT UPON ORDER TO SHOW CAUSE

STATE OF CALIFORNIA,
County of Los Angeles, ss:

F. B. Yoakum, Jr., being first duly sworn, deposes and says:

That he is one of the attorneys of record for respondents in the matter as above entitled, and makes this affidavit on behalf of said respondents and each one thereof.

That it is the practice of the court as above entitled after a defendant in a criminal action has pleaded guilty or on trial has been found guilty and who applies for probation, to permit or deny such request In the event defendant is permitted by the court to file an application for probation, an application in writing upon a form provided by the court is filled out and filed with the Probation Department. Attached hereto, marked "Exhibit A," is a copy of such form of application for probation. That following the filing of such application for probation, filled out and executed by the applicant, the Probation Department then investigates the prior history, family traits, past environment and other allied subjects concerning the defendant. As a regular part of its investigation the Probation Department [fol. 89] sends letters to the persons whom the defendant has given as references. In such letters request is made that the person to whom the letter is sent inform the Probation Department as to the conduct, habits and tendencies of the defendant. That attached hereto, marked "Exhibit B," is a copy of said form of letter.

All responses to such letters are incorporated into and made a part of the report to the court of the probation officer. In the event that letters are received by the probation officer dealing with the application for probation, other

than replies to letters sent out by the probation officer, such voluntary letters are also incorporated in and made a part of the probation officer's report. Such voluntary letters are occasionally received. These voluntary letters sometimes take the form of petitions requesting favorable action by the Probation Department, but occasionally petitions are received by the Department stating that the application should be denied. The number of petitions favoring the denial of the application are far less numerous than those requesting favorable action.

Attached hereto, marked "Exhibit C," is a pamphlet composed by Carl L. May, formerly, if not presently, Chief Probation Officer in charge of adult probation in Los Angeles County. Said pamphlet is published and issued under authority of the Probation Department of said County.

Affiant has made an examination of the court files in certain criminal cases heretofore tried and pending in the court as above entitled and has examined the probation officer's report in such cases where applications were made for probation and has observed in said reports letters of the character hereinbefore in this affidavit referred to and has observed in at least one instance in said files a letter re- [fol. 90] specting the penalty to be imposed, directed to the judge before whom application for probation was pending by the office of the District Attorney of the county above entitled.

In the year 1933 a book entitled "Adult Probation," written by Mr. Justin Miller, was published by the Adult Probation Proceedings Publication Committee of Los Angeles, California. At page 7, column 2, of this publication it is stated that when an application for probation is received, the Department requests a report from the Police Department covering the facts of the case and that a form letter is sent to the references furnished by the defendant requesting various information. Among other matters of information requested, being one entitled "Recommendations." At page 11, column 1, of said publication appears the statement that the primary purpose of the investigation is for the information of the court. In column 2, page 11, it is stated that it is the practice to send letters to the references given by the defendant and that it is good practice to notify the proper police departments, mercantile associations, welfare associations and all kindred organiza-

tions, requesting them to furnish such information as they have to the Department and giving them an opportunity to present any facts that they may have. At page 13, column 1, it is stated that in a certain corporate securities case (the name of the same not being mentioned) the Probation Department received petitions and letters containing the signatures of approximately three hundred to four hundred persons, both for and against the defendant. At page 20, column 2, it is stated that the probation officer should advise the judge as to the agencies which he has con- [fol. 91] tacted, and when making his report should make it intensely realistic. At page 24 is the statement attributed to the Presiding Judge Ruben S. Schmidt in the court as above entitled, setting forth matters which should be contained in the report of the probation officer. Among other things, Judge Ruben Schmidt is quoted as stating that the report should reflect the identity of the sponsors of the applicant for probation. At page 30, column 1, of said publication it is stated that one matter which is very important to be contained in the report is the probation officer's opinion of the defendant's future possibilities, and under this heading should be told exactly what the probation officer thinks of defendant and what defendant's friends and employers think of him.

Further affiant sayeth not.

F. B. Yoakum, Jr.

Subscribed and sworn to before me this 24th day of June, 1938. Annabel Smith, Notary Public in and for the County of Los Angeles, State of California. (Notarial Seal.)

(Here follow 2 photolithographs, side folios 91a-91b)

EXHIBIT "A" TO AFFIDAVIT

APPLICATION FOR PROBATION

(Fill in all questions fully and carefully)

Dept.....

Case No.....

File No.....

Jail Booking No.....

Name..... Charge Convicted of..... Original Charge.....

Address..... Date of Probation Sentence..... On Bond.....

Plea..... Verdict..... User of Narcotics..... Intoxicants.....

Date of Birth..... Age..... Birthplace..... Race.....

Age started to work..... Education..... Occupation.....

Married..... Single..... Separated..... Divorced.....

Date Came to U. S..... to California..... to L. A. Co..... Citizen U. S.....

Wife's Maiden Name..... Address.....

Children's Names	Age	Address

Complaining Witness..... Address.....

Arresting Officer..... Where Arrested..... Date.....

Previous Arrests: Give charges, dates, places

Where Last Employed? How Long?

When Terminated and Why

Physical Condition..... Mental Condition.....

Mother's Maiden Name..... Address..... Nativity.....

Father's Name..... Address..... Nativity.....

Parents Separated..... Divorced..... Remarried..... Dead.....

Name and Address of Next Nearest Relative

REFERENCES: State completely

Give one Reference during School Period: Reference

Address

Date Came to U. S. ..... to California ..... to L. A. Co. ..... Citizen U. S. .....

Wife's Maiden Name ..... Address .....

Children's Names	Age	Address

Complaining Witness ..... Address .....

Arresting Officer ..... Where Arrested ..... Date .....

Previous Arrests: Give charges, dates, places

Where Last Employed? ..... How Long?

When Terminated and Why .....

Physical Condition ..... Mental Condition .....

Mother's Maiden Name ..... Address ..... Nativity .....

Father's Name ..... Address ..... Nativity .....

Parents Separated ..... Divorced ..... Remarried ..... Dead .....

Name and Address of Next Nearest Relative .....

REFERENCES: **State completely**

Give one Reference during School Period: Reference ..... Address .....

Give one Reference after leaving School: Reference ..... Address .....

Give Four References during last five years: Reference ..... Address ..... Reference ..... Address ..... Reference ..... Address ..... Reference ..... Address .....

Dated 193

Signed .....

Applicant .....

(Employment Record must be written on back.)

91-A

COMPLETE EMPLOYMENT RECORD

DATE	TO	NAME OF FIRM OR EMPLOYER	ADDRESS	NATURE OF WORK	REASON FOR LEAVING

I CERTIFY THAT THE ABOVE IS A TRUE RECORD OF ALL JOBS HELD BY ME SINCE I LEFT SCHOOL

APPLICANT

Superior Court
Case No.

Defendant's Name

Investigating Officer

Attorney

Address

Address

Divisional Director

Telephone

Deputy Probation Officer

Dept. No.

Prob. File No.

Date of Probation Sentence

The original and copy of the Application for Probation duly signed by the applicant should be filed with the Probation Department, 803 Law Bldg., Los Angeles, on the same day that permission is granted. The transcript of the preliminary hearing should accompany the application.

91-B

EXHIBIT "C" TO AFFIDAVIT

ADULTS ON PROBATION

WICKERSHAM REPORT RECOMMENDS PROBATION

It is the opinion of many people that through the Probation law many undeserving offenders are being constantly released. This statement is in error and is not supported by Court records. The Wickersham report, recently published by the United States Government, Washington, D.C., entitled, "PENAL INSTITUTIONS ? PROBATION AND PAROLE ?" proves this conception to be erroneous and emphasizes the good results of probation as now practiced. This report states, "PROBATION AS IT IS APPLIED TO THE ADULT OFFENDER IS THE MOST HOPEFUL ASPECT IN THE WHOLE FIELD OF CRIMINOLOGY "

UNEMPLOYMENT AND PROBATION

Due to the present disturbed economic conditions, unemployment is general. The curtailment of budgets and the reduction in payrolls has had a very serious anti- social effect upon a group who under normal condition would not violate our laws. The breakdown due to unemployment is the basic cause of many of the domestic problems and is often the cause of a physical and moral collapse which would not occur if steady and gainful employment were provided.

THE PROBATION OFFICER'S RESPONSIBILITY TO THE PUBLIC

County and State through the use of probation is obvious.

VICTIMS REIMBURSED

Thousands of dollars are reimbursed annually as a part of the probation orders to those who have been defrauded by probationers. Most probation officers are requesting in many cases that a fine be imposed as a condition of probation. These fines which are collected in installments during the term of probation often more than offset the total cost of probation.

PROBATION WITH INCARCERATION

A large percentage of those placed on probation must serve a County jail or Road Camp sentence of from one month to two years as part of their probation. When these men are released society is duty-bound to give them an opportunity to rehabilitate themselves by assisting them to find employment and a proper environment.

PROBATION RESTORES GOOD CITIZENSHIP

The beneficial results of probation must be broadcast if the tax-payers are to obtain the proper conception of this important field of social service It cannot be expected that people will laud probation if we fail to place in their hands the necessary facts which reveal that probation wisely and judiciously granted is instrumental in restoring many to good citizenship. An appeal should be made to churches, fraternal organizations, service clubs etc. to aid in this rehabilitation by

probation, be deported or leave the state during the period of probation. Most counties handle failure to provide cases under a probation order and thousands of dollars are collected for the support of minor children.

At the present time not over ten percent of those who apply receive outright probation. In most instances the Court in granting probation includes some special order such as mentioned above, designed to protect the interests of the public and particularly those who have been injured through the criminal acts of the probationer. One can readily see that the Probation officers and the Courts are doing their utmost to administer probation consistantly with the public's good and are doing their utmost to select only worthy cases for probation.

PROBATION ELIMINATES CHARITY GIFTS

Another matter of economic importance is the fact that for every five men sentenced to prison there are two dependents left to be suported by relatives, friends or charity. Often these are minor children who through neglect may eventually come into the Juvenile Court and become public charges.

If the one released on probation has dependents he is called upon to support them.

PROBATION REFORMS

The fact that the vast majority of those placed on probation respond readily to this method of social adjustment and are later dismissed as having made good, proves that the real object of

and is often the cause of a physical and moral collapse which would not occur if steady and gainful employment were provided.

THE PROBATION OFFICER'S RESPONSIBILITY TO THE PUBLIC

The Probation Officer has been placed in a position of trust by the public and should select only those cases for probation which he feels can be rehabilitated. Before a case is recommended to the Court for probation it is thoroughly investigated and the previous record of subject as well as his character are carefully considered and conditions involving the present as well as past offenses of the petitioner are also included in the report of the probation officer which is furnished the Court. When the Probation officer appears before the public he must be able to say that the trust that has been placed in him has not been in vain. A vast majority of those placed on probation make good, and with a little encouragement and co-operation on the part of society, the use of probation could be greatly extended.

PROBATION SAVES MONEY FOR TAXPAYERS

The Constitution of the United States provides that every person charged with the commission of a crime is entitled to a jury trial. Due largely to the Probation law, seventy per cent(70pct.) of those appearing in the criminal courts plead guilty and apply for probation. The cost of a jury trial runs into many hundreds of dollars and the amount saved the probation if we fail to place in their hands the necessary facts which reveal that probation wisely and judiciously granted is instrumental in restoring many to good citizenship. An appeal should be made to churches, fraternal organizations, service clubs etc. to aid in this rehabilitation by supplying employment and the proper environment to those released on probation.

EIGHT THOUSAND ADULTS ON PROBATION IN CALIFORNIA (ADULT).

At the present time there are over 8,000 persons on Adult Probation in California. This is more than the number in the two prisons, and without probation two new prisons would have to be built. The upkeep of an individual in a California prison averages $228.13 per year. The cost of probation per year is only $26.65. This is an economic argument which can be offered to the taxpayer and cannot be answered by critics of probation. One can readily realize the added tax burden to property owners and others if probation was eliminated from our statutes and prison sentences meted out by our courts.

PROBATION WITH RESTRICTIONS

The Courts are granted much latitude in dealing with probationers under the provisions of Section No. 1203 of the Penal Code (The Adult Probation Law.) The probationer may be ordered to serve a certain period of his probation in the county jail, make restitution for damages resulting from the criminal act, pay a fine during the period of [illegible] to support them.

PROBATION REFORMS

The fact that the vast majority of those placed on probation respond readily to this method of social adjustment and are later dismissed as having made good, proves that the real object of probation has been successfully accomplished.

Probation wherever tried has proven to be successful and it is constantly being adopted throughout the United States and in many other countries, in an effort to assist those who are deemed worthy of an opportunity to make good outside prison walls.

Probation without proper supervision is apt to result in failure. Much better success could be obtained through cooperation of coordinating councils, service clubs, religious organizations and individuals in assisting to properly care for and supervise those granted this leniency by the State.

Public opinion is gradually being molded to the realization that punishment in itself has never in the centuries that it has been tried decreased the ranks of those of our anti-social class. Therefore, it becomes the fundamental duty not only of probation officers but of the courts, peace officers and others to devote more time in the correction of the causes of crime and to assist those men and women with anti-social characteristics brought to their attention to become useful citizens.

CARL L. MAY, Director, Supervision
Los Angeles County Probation
Department (Chairman of
Publicity Committee, California
Probation Officers' Association)

[fol. 92] EXHIBIT "B" TO AFFIDAVIT

COUNTY OF LOS ANGELES, PROBATION OFFICE

803 Law Building, 139 North Broadway,

Los Angeles, California

Refers To: ——

_____

_____

_____

DEAR SIR:

The above named person has applied for probation, having been convicted on a charge of ——.

Will you kindly write this department, 803 Law Bldg., Los Angeles, and state how long you have known this defendant and whether your knowledge has been in a social or business way. We would appreciate information as to his conduct, habits and tendencies.

Have you information as to any prior arrests or convictions of the party applying for leniency?

Any other information, including the mental and physical condition of the defendant or his family, will be of help to us and will be appreciated.

It is important that we receive an early reply in order that a proper presentation of the case may be made to the Court.

Yours very truly, K. J. Scudder, Probation Officer, by John M. Zuck, Director Adult Division.

Prob. 62 5m 3-38

(Here follows 1 photolithograph, side folio 92a)

[fol. 93] EXHIBIT NO. 11

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 428920

In the Matter of THE TIMES-MIRROR COMPANY, a Corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, Respondents, In Contempt

JUDGMENT

This proceeding in contempt against respondents was instituted by the filing in this court, on June 3, 1938, of an

affidavit subscribed and sworn to by J. Louis Elkins, Executive Secretary of the Los Angeles Bar Association, containing five counts of contempt of court, alleged to have been committed by the respondents. Said affidavit was presented to the court by Allen W. Ashburn, Michael G. Luddy, Isaac Pacht, and Arnold Praeger, as attorneys for the Los Angeles Bar Association. Based on this affidavit, the court ordered respondents to appear before the Court in Department 1 thereof, on June 23, 1938, at 10:00 o'clock a. m., to show cause why they should not be adjudged guilty of contempt of court and punished therefor by reason of the acts and each of the acts set forth in each of the five counts contained in said affidavit and alleged to have been committed by the respondents and each of them.

The respondents filed a demurrer, both general and special, and at the date of hearing of said demurrer, towit, on the 5th day of July, 1938, through their counsel, Messrs. Cosgrove & O'Neil and F. B. Yoakum, orally moved and objected as follows: (1) For an order directing that the [fol. 94] name of each attorney appearing herein with the name of the person or organization on whose behalf he appears be stated in open court and entered in the minutes by the clerk. (2) For an order directing that this proceeding be entitled "People of the State of California vs. The Times-Mirror Company, a corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, Respondents, In Contempt." (3) Objecting to any party other than the State of California prosecuting this proceeding and objecting to any attorney appearing or acting or being permitted to appear or act as prosecuting attorney herein other than the Attorney General of the State of California or the District Attorney of Los Angeles County. (4) Objecting to the Los Angeles Bar Association, or any Committee of said association, or anyone appearing, or claiming to appear, as attorney for said association, or for any committee of said association, appearing or acting or being permitted to appear or act as attorney or attorneys for the prosecution of this proceeding. (5) For an order directing that the District Attorney for the County of Los Angeles, and the Attorney General for the State of California, be notified of this proceeding and for a further order directing that no other or further proceeding be had or taken herein until said District Attorney or said Attorney General shall appear herein as attorney for the prosecution of this proceed-

ing. (6) Objecting to any proceedings being taken herein unless and until the People of the State of California are made a party hereto and appear herein by the proper officer of said State in that behalf duly authorized. (7) Objecting to the Los Angeles Bar Association or any committee of said Association or anyone appearing or claiming to appear as [fol. 95] attorney for said Association or for any committee of said Association controlling or directing either as attorney of record or otherwise, this prosecution.

At the hearing of said demurrer and said oral motion and said oral objections, the said attorneys for the Los Angeles Bar Association appeared as friends and officers of the court to assist the court in the prosecution and hearing of said proceeding, and pursuant to an order of court, permitting him so to do, A. L. Wirin, Attorney for the American Civil Liberties Union, appeared as amicus curiae on behalf of the respondents.

At said hearing, the court permitted said attorneys for the Los Angeles Bar Association to appear herein for the Los Angeles Bar Association and prosecute these proceedings as officers of the court and made an order overruling said oral motion and objections made by respondents.

Thereafter, towit, on the 18th day of August, 1938, the court made an order sustaining the demurrer of respondents as to counts (2) and (4) in said affidavit, without leave to amend, and overruling the demurrer as to the counts (1), (3), and (5), and granted the respondents five days within which to answer (their counsel having indicated this to be sufficient time).

The respondents filed individual answers within the time provided by said last mentioned order and the respondent Harry Chandler filed an affidavit in support thereof, and respondents also filed an affidavit subscribed and sworn to by Frank B. Yoakum, Jr., in support of the answers filed by the respondents.

[fol. 96] That this proceeding came on for hearing on the 25th day of August, 1938, in Department No. 34 of the above entitled court, before the Honorable Emmet H. Wilson, Judge thereof presiding, the respondents Norman Chandler and L. D. Hotchkiss appearing in person, the respondent Harry Chandler not appearing in person, Messrs. Cosgrove & O'Neil and F. B. Yoakum appearing for all respondents, and Messrs. Allen W. Ashburn, Isaac Pacht, Michael G. Luddy, and Arnold Praeger appearing for Los Angeles Bar

Association and officers of the Court to assist in the prosecution of this proceeding. Thereupon, the court proceeded to investigate the charges contained in counts (1), (3), and (5) of said affidavit of J. Louis Elkins and heard the answers and affidavits filed by or on behalf of respondents and examined witnesses for and against said respondents.

It appearing that the order to show cause having issued, a due return and appearance having been made by The Times-Mirror Company, a corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, the respondents herein, and the court being fully advised in the premises,

It is ordered and adjudged:

1. The Court finds that the allegations of counts (1), (3), and (5) of said affidavit of J. Louis Elkins respecting the respondent The Times-Mirror Company are true and that the said respondent, The Times-Mirror Company, a corporation, is guilty of contempt of court as specified, and in the particulars set forth in the order to show cause herein and in the said affidavit of J. Louis Elkins in counts (1), (3), and (5) thereof, and that as punishment therefor, the Court orders that the said respondent, The Times-Mirror Company, a corporation, shall pay a fine of $100.00 on count (1), $100.00 on count (3), and $300.00 on count (5), as set forth [fol. 97] in said affidavit, making in all the sum of $500.00, for which amount let execution issue.

2. The Court finds the respondents Harry Chandler and Norman Chandler not guilty of contempt of court as to all three of said counts in said affidavit.

3. The Court finds the respondent L. D. Hotchkiss not guilty of contempt of court on counts (3) and (5) as set forth in said affidavit.

4. The Court finds that the allegations of count (1) as set forth in said affidavit of J. Louis Elkins respecting the respondent L. D. Hotchkiss are true and finds the respondent L. D. Hotchkiss is guilty of contempt of court as specified, and in the particulars set forth in the order to show cause herein and in count (1) of said affidavit of J. Louis Elkins, and orders him, the said L. D. Hotchkiss, to pay a fine of $100.00 on said Count (1), and that in default of payment thereof, the said L. D. Hotchkiss shall stand committed to the Sheriff of the County of Los Angeles, State of California, and, until such fine is paid, he shall be imprisoned

in the county jail of said county at the rate of one days' imprisonment for each $2.00 of said fine.

Execution and committment are and each is stayed for thirty days.

Dated: This 31st day of August, 1938.

Wilson, Judge of the Superior Court.

[fol. 98] *Duly sworn to by H. E. Downing. Jurat omitted in printing.*

[fols. 99-105] In Supreme Court of California

[Title omitted]

Memorandum of Points and Authorities in Support of Petition for Writ of Review

Your petitioners respectfully submit to this Honorable Court the following points and authorities in support of their Petition for Writ of Review:

* * * * * * *

[fols. 106-107] V

The Order Adjudging Petitioners Guilty of Contempt of Court Violates the Rights of Freedom of Speech and of the Press Guaranteed by the State and Federal Constitutions

California Constitution, Art. I, Sec. 9;
United States Constitution, Amendments One and Fourteen;
In re Shortridge, 99 Cal. 526;
In re Shuler, 210 Cal. 377;
In re Matter of Lyons, 94 Cal. App. Dec. 70; 81 Pac. (2d) 190 (decided June 24, 1938).

"In a republic it is necessary that the rights of freedom of speech and freedom of the press be zealously guarded by the courts. Those rights form the life stream of liberty. History teaches us that when those rights are suspended,

the right to possess and enjoy private property rapidly vanishes."

94 C. A. D. 78.

Gitlow v. New York, 268 U. S. 652, 666;
Whitney v. California, 274 U. S. 357, 371, 373;
Fiske v. Kansas, 274 U. S. 380, 382;
Stromberg v. California, 283 U. S. 359, 368, 369;
Near v. Minnesota, 283 U. S. 697, 707, 714-715, 716;
Grosjean v. American Press Co., 297 U. S. 233, 243, 244, 248, 249-250;
Lovell v. City of Griffin, 302 U. S. —, 58 S. Ct. 666, 668, 669.

* * * * * * *

[fol. 108] Respectfully submitted, Cosgrove & O'Neil, T. B. Cosgrove, F. B. Yoakum, Jr., Attorneys for Petitioners.

[fol. 109] In Supreme Court of California

[Title omitted]

Writ of Review

The People of the State of California Send Greeting to the Superior Court of the State of California, in and for the County of Los Angeles:

Whereas, it has been represented to this court by the verified petition of petitioners above named, on file herein, that you, the said Superior Court of the State of California, in and for the County of Los Angeles, have made, signed, filed and caused to be entered a judgment or order adjudging petitioners and each of them in contempt of court; and

Whereas, it has been further represented to this court by said petitioners that said order or judgment was and is erroneous and void for the reasons set forth at length in said petition and which fully appear from said petition on file herein, reference thereto being hereby made; and

Being willing that the records and proceedings in said matter, upon which said order or judgment is based, and that all matters relating thereto shall be certified and returned by you to this court;

It Is Ordered, that you, the above named respondent, [fols. 110-112] The Superior Court of the State of California, in and for the County of Los Angeles, certify or cause to be certified and returned to this court on the 7th day of December, 1938, at the hour of 10 o'clock A. M. on said day, at the court room of this court in the State Building at Los Angeles, California, a full, true and correct transcript of all papers, records, files and proceedings in said proceeding above specified pending before you, in your possession or under your control, in order that the same may be reviewed by this court and such action taken thereon as of right and as, according to law, shall be taken and done, and that you then and there have this writ.

And pending the action of this court thereon, you, the respondent above named, are commanded and required to desist from further proceedings in said matter, and that all proceedings for the execution of the order or judgment entered against petitioners on the 1st day of September, 1938, be stayed.

* * * * * * *

Witness the Honorable William H. Waste, Chief Justice, and the Associate Justices of the Supreme Court of the State of California.

Attest my hand and the seal of this court this 6th day of October, 1938.

B. Grant Taylor, Clerk of said Court, by L. F. White, Deputy. (Seal.)

* * * * * * *

[fol. 113] IN SUPREME COURT OF CALIFORNIA

L. A. No. 16928

THE TIMES-MIRROR COMPANY, a Corporation, and L. D. HOTCHKISS, Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent

L. A. No. 16929

THE TIMES-MIRROR COMPANY, a Corporation, HARRY CHANDLER AND L. D. HOTCHKISS, Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent

Stipulation Concerning Record of Proceedings Under Review

It Is Hereby Stipulated by the parties hereto and their respective counsel as follows:

1. A consolidated record may be presented and used by the court in response to the Writs of Review issued in the proceedings as above entitled.

2. Those certain pleadings hereinafter enumerated, appearing in the Petition for Writ of Review in each of the above entitled matters, may be considered a part of the consolidated record upon review herein—that is to say:

[fols. 114-115] First, in L. A. No. 16928, the following pleadings appearing in the petition, viz:

Exhibit No. 1—Affidavit of J. Louis Elkins;
Exhibit No. 2—Order to Show Cause;
Exhibit No. 3—Demurrer of Respondents;
Exhibit No. 5—Answer of Respondent The Times-Mirror Company, a corporation;
Exhibit No. 6—Answer of Respondent Harry Chandler;
Exhibit No. 7—Answer of Respondent Norman Chandler;
Exhibit No. 8—Answer of Respondent L. D. Hotchkiss;

Exhibit No. 9—Affidavit of Respondent Harry Chandler upon Order to Show Cause;

Exhibit No. 10—Affidavit of F. B. Yoakum, Jr., upon Order to Show Cause;

Exhibit No. 11—Judgment of the Trial Court.

* * * * * * *

[fols. 116-117] 3. The motions and objections and the rulings and exceptions thereon, hereinafter enumerated, appearing in the Petition for Writ of Review in each of the above entitled matters, may be considered a part of the consolidated record upon review herein—that is to say:

First, in L. A. No. 16928, the following:

(a) The motions and objections and grounds assigned in support thereof, appearing on pages 4 and 5 of the petition.

(b) The recitals of presentation, argument, rulings and exception appearing on page 6 of said petition, reading as follows:

"Thereupon on said 5th day of July, 1938, following the presentation of argument by counsel for respondents (petitioners herein) in support of the motions and objections and following the presentation of argument by counsel for the Los Angeles Bar Association in opposition to the motions and objections, said motions and objections were, and each one thereof was, denied and overruled. Counsel for the respondents, and each one thereof (petitioners herein), took and saved an exception to the rulings of the court on each of said motions and each of said objections."

* * * * * * *

[fols. 118-119] 4. Certain statements of counsel for petitioners herein, made at the time of argument of demurrers to sufficiency of affidavits upon order to show cause, which statements appear in the Petitions for Writ of Review in the above entitled matters, may be considered a part of the consolidated record upon review herein—that is to say:

First, in L. A. No. 16928, the following:

Exhibit No. 4, being statements of counsel for respondents (petitioners herein).

* * * * * * *

[fol. 120] 5. The proceedings of Thursday, August 25, 1938, hereinafter set forth, constitute a correct and complete copy of all proceedings had and taken on the trial of the contempt proceedings now pending before the above entitled court upon writs of review:

"In the Superior Court of the State of California, in and for the County of Los Angeles

Department No. 34, Hon. Emmet H. Wilson, Judge

No. 428-920

In the Matter of the Times-Mirror Company, et al.

No. 429-179

In the Matter of the Times-Mirror Company, et al.

Reporter's Transcript of Testimony and Proceedings on Trial of Cause

Appearances: No. 428-920

Allen W. Ashburn, Michael G. Luddy, Isaac Pacht and Arnold Praeger, Esqs., for California State Bar Association.

Appearances: No. 429-179

Allen W. Ashburn, Michael G. Luddy, Isaac Pacht and Arnold Praeger, Esqs., for California State Bar Association.

Cosgrove & O'Neil, by T. B. Cosgrove, Esq., and F. B. Yoakum, Jr., for Respondents.

Los Angeles, California, Thursday, August 25, 1938.

[fol. 121] Los Angeles, California, Thursday, August 25, 1938, 10:00 A. M.

The Court: You may proceed with the Times cases.

Mr. Cosgrove: We have the two cases and I presume we have to go along with them as two separate and distinct cases. I have given some consideration to the question of introduction of evidence, and I would be glad to stipulate if during the presentation of the evidence in one case, if it

appeared to the court and counsel that it was relevant to the other, we would be glad to make a stipulation to that effect.

Mr. Luddy: Yes.

The Court: You may proceed with the first case, No. 428-920.

Mr. Luddy: I will call Mr. Trueblood to the stand.

Mr. Cosgrove: The court understands Mr. Trueblood is very hard of hearing.

Ralph W. Trueblood, called as a witness by and on behalf of the plaintiffs herein, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Ralph W. Trueblood. 184 Rockingham Avenue, Brentwood Park.

Direct examination.

By Mr. Luddy:

Q. What is your business or occupation, Mr. Trueblood?

A. I am a newspaper man.

Q. And you are connected with what newspaper?

A. "The Los Angeles Times."

Q. You have been connected with that paper for approximately thirty years, have you not?

A. Somewhat less than that, about 27, I think.

[fol. 122] Q. And during that period of time you have occupied various positions, starting out as reporter, continuing on through city editor, assistant managing editor, managing editor and executive editor, have you not?

A. That is correct.

Q. And at the present time what, if any position, do you occupy with "The Times"?

A. I have charge of the editorial page.

Q. Does that position carry with it any title such as "executive editor" or some similar title?

A. I am sometimes referred to as "editorial director." It is not a formal title.

Q. During what period of time have you occupied the position of editorial director?

A. Since approximately the 1st of February of this year.

Q. Prior to the 1st of February of this year and for a period of approximately one year prior thereto what had been your position with "The Times"?

A. I was on sick leave during that——

Q. Over what period of time were you on sick leave?

A. About one year and one month.

Q. And do you remember about the approximate date that you returned to "The Times", the conclusion of your sick leave?

A. About the 1st of February.

Mr. Cosgrove: Will you speak a little louder, please?

A. I beg pardon?

Q. Will you speak a little louder, please?

Mr. Luddy: I am prone, like most lawyers, when I am asking questions of someone that has difficulty in hearing to talk too loud. If I should talk too loud, do not hesitate to tell me. Will you please tell us in more detail just what your duties have been as editorial director of "The Times" during the period you have occupied that position?

[fol. 123] A. Well, my principal duty has been the preparation under my direction of the material which is published on the editorial page. In a general way I might be said to have, in that capacity, to have charge subject to the general direction of the president and general manager of the company of policy matters.

Q. Do you actually write editorials, or have you since the time you have returned?

A. I have, some of them, yes.

Q. Are there men under your direction whose duty it is to write editorials for "The Times"?

A. That is correct.

Q. How many men are engaged, if not entirely, principally, in the writing of editorials?

A. Three and occasionally four.

Q. And are the editorials submitted to you before they actually appear in the newspaper?

A. That is correct.

Q. I think you made some reference to direction or supervision of the president and general manager of the paper or of the corporation. To whom did you have reference in your answer?

A. To Mr. Harry Chandler, President of "The Times Mirror Company," and to Mr. Norman Chandler, Vice-president and General Manager.

Q. Are there daily round-table sessions or conferences at all between you and other persons connected with "The Times" with respect to matters which appear on the editorial page or the general reading content from time to time?

A. No, sir.

Q. Do you have the duty and is it your responsibility to pass upon the question of whether any particular editorial which may have been written shall or shall not appear in the paper?

[fol. 124] Mr. Cosgrove: I object to the question. The witness is being called upon to state a conclusion. The court would decide that.

Mr. Luddy: I will withdraw the question.

Q. Who, if anybody, at "The Times" determines whether or not a particular editorial which has been prepared shall appear in the paper?

A. It is almost impossible to answer that question. It would depend upon the editorial. In a general way, I decide whether or not it shall appear.

Q. In the event that it is an editorial which does not fall within that general class that you decide upon, then who decides upon it?

A. It would in that case be referred to the president of the company.

Q. That is Mr. Harry Chandler?

A. That would be Mr. Harry Chandler.

Q. I understand that you were away on your sick leave in December and particularly on December 21, 1937, is that right, Mr. Trueblood?

A. That is correct.

Q. Therefore I take it you know nothing at all about any editorials which may have appeared in "The Times" at that period?

A. Only as having read them.

Q. Afterwards. Did you read them afterwards?

A. I did.

Q. During the time you were on sick leave were any editorials referred to you prior to the time they appeared in the paper?

A. I don't recall any.

[fol. 125] Q. During the time you were on your sick leave, Mr. Trueblood, do you know who assumed and performed the duties which you had been performing up until the time you left?

A. Yes, sir.

Q. Who was it?

A. Mr. L. D. Hotchkiss.

Q. You were the editorial director of "The Times," were you not, on the 14th of April, 1938?

A. Yes, sir.

Q. Do you know who wrote the editorial which appeared in the issue of "The Times" on April 14, 1938, entitled, "The Fall of an Ex-Queen"?

A. Yes.

Q. You were editorial supervisor or director, rather, of "The Times" on May 5, 1938, were you not, Mr. Trueblood?

A. Yes, sir.

Q. Do you know who wrote the editorial which appeared in the May 5, 1938, issue of "The Times" entitled "Probation for Gorillas"?

A. I do.

Q. Were you the editorial director of "The Times" on June 5, 1938?

A. I was.

Q. Do you know who wrote the editorial entitled "A Black Committee Here", which appeared in the June 5, 1938, issue of "The Times"?

Mr. Cosgrove: Of course, that is not involved in this action.

The Court: We have not reached that.

Mr. Luddy: I understood that any testimony—maybe I misunderstood our stipulation.

[fol. 126] The Court: I think we were going to try the first case first and then proceed with the second and anything that appears to have been introduced in the first that may be applicable in the second may be deemed to be introduced in the second case.

Mr. Luddy: All right.

Q. Do you know who wrote the editorial "Sit Strikers Convicted", which appeared in the December 21, 1937, issue of "The Times?"

A. No, sir.

Q. Who wrote the editorial entitled "The Fall of an Ex-Queen", which appeared in the April 14, 1938, issue of "The Times"?

Mr. Cosgrove: Now, if the court please, for the purpose of the record, this answer will incriminate this witness. I know what he will answer. But we are not going to object to it. We want the court to understand and we want counsel to understand we are not making any secret of who wrote these editorials, that they were written in the utmost good faith, in the belief that they were well within the law and accordingly we, without the slightest hesitation, allow the witness to proceed to answer the question, although this answer will incriminate the witness.

Mr. Luddy: I think that is very fair. You may answer it.

A. I wrote the editorial.

Q. Who wrote the editorial "Probation for Gorillas" which appeared in the May 5, 1938, issue of "The Times"?

A. Edward C. Krauss wrote the editorial at my direction.

Q. That is the "Probation for Gorillas" editorial?

A. That is correct.

Q. Mr. Krauss, did you say?

A. Edward C. Krauss.

[fol. 127] Q. At the time that the editorial entitled "The Fall of an Ex-Queen" was written, did you submit it to any other or any officer of "The Times-Mirror Corporation" prior to the time it appeared in the paper?

A. No, sir.

Q. And did you discuss it in any manner with Mr. Hotchkiss, Mr. Harry Chandler or Mr. Norman Chandler?

A. I did not.

Q. Do you know whether or not any proofs of the editorial or any proofs of the editorial page were submitted to either of the Messrs. Chandler or Hotchkiss prior to the time that editorial was published?

A. If you mean by the word "submitted" that they were intentionally brought to the attention of these gentlemen for the purpose of examining or passing upon them, the answer is no.

Q. I don't necessarily mean that, Mr. Trueblood. Perhaps I can bring out what I had in mind by asking whether or not it is the custom and practice at "The Times" to submit proofs of the editorial page or of editorials to either Mr. Hotchkiss, Mr. Harry Chandler or Mr. Norman Chand-

ler prior to the time the paper is actually made up and printed?

A. It is not. I might elaborate that by saying, however, that proofs of editorial matter would in the normal course of the office routine come under the attention of the managing editor but not, however, Mr. Norman Chandler or Mr. Harry Chandler.

Q. By the "managing editor" you refer to Mr. Hotchkiss?

A. I refer to Mr. Hotchkiss.

Q. Tell us in what fashion the proposed contents of the editorial page prior to its publication would come to the attention of Mr. Hotchkiss?

[fol. 128] A. That would be merely incidental to his general supervision of the paper. Practically all matter which is intended for publication on the day succeeding is taken in proof form and eventually finds its way to the managing editor's desk.

Q. So that if the ordinary routine is carried out there at "The Times" matters which it is proposed to have appear in next day's issue of "The Times," whether it be editorial or other reading content, would come to Mr. Hotchkiss' desk prior to the time it is published?

Mr. Cosgrove: The question is objected to on the ground it is summing up all the evidence and does not call for a recital of facts.

The Court: Sustained.

By Mr. Luddy:

Q. You say Mr. Krauss wrote the editorial entitled "Probation for Gorillas" and that he wrote it under your direction?

A. That is correct.

Q. What, if anything, did you suggest to him as to what the editorial should contain?

A. As I recall it, I handed him a clipping of a news story in which it was stated that two convicted defendants in a strike assault case had made application for probation. I told him it has been our understanding for many years and under such instances it was the privilege of a newspaper or of anyone qualified to pass an informed opinion on the subject to express that opinion as to whether or not probation should be granted. I told him in substance and effect that

I did not believe probation should be granted and I thought we should vigorously oppose it.

Q. After that conversation did he proceed to write an editorial on the subject?

[fol. 129] A. He did.

Q. Was the editorial submitted to you in typewritten form after he had completed it?

A. That is correct.

Q. Do you recall whether or not you or anybody else at "The Times" made any changes, amendments or corrections at all on it as it was submitted by Mr. Krauss?

A. It is quite possible some changes were made in it but I don't recall what they were. They were not very important changes in any case.

Q. Was that editorial or the contents thereof discussed with Mr. Harry Chandler or Mr. Norman Chandler by you or by anybody else, to your knowledge?

A. It was not.

Q. Did it come, to your knowledge, to the attention of Mr. Hotchkiss, the managing editor, prior to the time it was published?

A. Not to my knowledge.

Q. Was it a part of the proofs of the reading matter which was submitted to Mr. Hotchkiss in his capacity as managing editor, together with other editorials or other reading matter prior to the time it appeared?

A. I could not say.

Q. Who do you recognize in "The Times" organization as being your immediate superior?

A. Mr. Harry Chandler.

Q. Who has the final word at "The Times" as to whether or not anything shall appear therein, either on the editorial page or anything else?

A. Mr. Harry Chandler.

[fol. 130] Q. In the event Mr. Harry Chandler should submit an editorial or any other reading matter, is there anybody connected with the organization that so far as you know has any right to say that matter shall not appear in "The Times"?

A. I did not get the question.

Q. In the event Mr. Harry Chandler shall submit a proposed editorial or any other proposed reading matter for an issue of "The Times," so far as you know, is there anybody connected with "The Times" or "The Times Mirror Com-

pany" that would have the right to tell Mr. Chandler the particular proposed article should not appear?

A. No, sir.

Q. You have referred to the fact that Mr. Norman Chandler, I believe, carries the title of general manager of the corporation, is that right?

A. That is correct.

Q. And is he known as the general manager of "The Times"?

A. Mr. Norman Chandler? That is correct.

Q. You have referred to the fact Mr. Harry Chandler is the president of the corporation, that is, "The Times Mirror." Does he hold any other title at "The Times," for instance, is he known as editor or publisher?

A. He of course is a director of the corporation. His title, however, is president of "The Times Mirror Company."

Q. Is he known at all as the editor of the paper?

A. He is frequently referred to as the "publisher" of the paper. The word "editor" of the paper is not commonly used nowadays as referring to the publisher. The active head of the newspaper is commonly referred to as "the publisher."

[fol. 131] Q. It is a fact, is it not, Mr. Trueblood, that to all of the employees of "The Times" Harry Chandler is the chief, he is the boss, is he not?

A. That is correct.

Q. I think that for a considerable period of time, Mr. Trueblood, you had been managing editor of "The Times," had you not?

A. I was managing editor for some years, yes, sir.

Q. And were you succeeded as managing editor by Mr. Hotchkiss?

A. I was.

Q. How long has Mr. Hotchkiss been managing editor of "The Times"?

A. I think since 1934. I won't be positive of that.

Q. And as managing editor does he perform the same duties which you performed when you had that title?

A. Well, there was some shifting about of duties at the time. When Mr. Hotchkiss became managing editor I became Editor in Chief. I resigned as Editor in Chief during the period of my sick leave and the office of Editor in Chief was then discontinued. Substantially speaking, the same

duties that I performed as managing editor have now devolved upon Mr. Hotchkiss, except the direction of the editorial page which is now vested in myself.

Q. I take it then you are familiar with the duties which Mr. Hotchkiss has had to perform for at least the past year in his capacity as managing editor of "The Times", are you not?

A. Yes, sir.

Q. Will you please tell the court what those duties are?

A. Well, they are rather numerous and rather complicated. In a general way, the managing editor has super-[fol. 132] vision of all of the reading matter which appears in the daily and Sunday editions of "The Times." That is about as comprehensive and simple a statement of the duties as I can make.

Q. And having supervision of all reading matter that also includes, does it not, matters which appear upon the editorial page and which are strictly speaking, known as editorials?

A. During the period of my absence, during my sick leave, that is correct.

Q. And upon your return, duties were divided so that you then took over exclusively the matter of supervision of the editorial page?

A. That is correct.

Q. But it is a fact, is it not, that the proofs of proposed editorials appearing upon the editorial page in the course of the routine operations of "The Times" would come through the desk of Mr. Hotchkiss, the managing editor, do they not?

A. That would not necessarily follow. That is a routine which is supposed to be followed in a general way. That does not, however, imply that because a proof of an editorial, we will say, comes to the desk of a managing editor that he assumes any responsibility whatever for that. Under our system I am personally responsible for what appears on the editorial page and no responsibility is shared by Mr. Hotchkiss in that regard.

Q. Before an issue of "The Times," and incidentally when I ask you these questions which appear to be of a general nature, I am referring to a period of time covered by approximately the past year—when an issue of the paper is about to go to press, who supervises the final work of de-

termining what shall go in and what shall not, if there be any question at all about that?

[fol. 133] A. That is divided among a number of departments. The general head and final arbiter of that in that case would be the managing editor.

Q. That would be Mr. Hotchkiss?

A. That would be—each department endeavors to settle its own space problems to the best of its ability.

Q. Assuming any question shall arise either as to you and Mr. Hotchkiss or anybody else, any other department heads of the paper as to whether a particular matter should or should not appear in the paper, an editorial or other reading matter, to whom would that be referred, whose decision would be final on it, for instance?

A. Pardon me. Do I understand you to mean if there were a conflict of opinion of whether or not certain matters should appear?

Q. That is right.

A. In that case the head of the company would be called upon to decide.

Q. That is Mr. Harry Chandler?

A. That is Mr. Harry Chandler.

Q. During the past year what, if anything, has Mr. Harry Chandler personally had to do or actively had to do with the publication of the paper, that is, can you tell us what he does down there at "The Times?"

A. I am afraid I am not qualified to answer that question. I am not closely enough in touch with Mr. Harry Chandler's office to be able to make a proper and comprehensive answer.

Q. Do your duties bring you in daily contact with Mr. Harry Chandler?

A. Not daily. I confer with him frequently but not daily.

Q. Do your duties bring you in daily contact with Mr. Norman Chandler?

[fol. 134] A. Not daily, no, sir.

Q. Are you qualified to tell us what Mr. Norman Chandler has to do with the publication of the paper?

A. Not otherwise than is implied in the titles which attach to his office.

Q. Tell us what that is, what is implied from that term.

A. I would say that the title of general manager, vice-president and general manager entail the duties of general business supervision of the activities of the paper and supervision of the entire paper subject to the prior direction of

the president and in general acting as vice-head of the newspaper.

Q. Do you know whether or not during the past year Mr. Harry Chandler has been at the plant of "The Times," the paper, as published daily?

A. Repeat the question.

Q. Do you know whether or not during the past year Mr. Harry Chandler has daily appeared at the plant where "The Times" is published, its building over here?

A. Mr. Harry Chandler is frequently absent from the city on business and other trips. With those exceptions since my return to "The Times" at least, he has been in the office every day.

Q. When he is not away on business and comes to the office do you know about what time he comes to his office at "The Times"?

A. I think usually between 10:00 and 11:00 in the morning.

Q. How late does he stay there?

A. About 6:00 o'clock usually.

Q. Does he return in the evening or is he there later?

A. That has not been his custom of late years.

[fol. 135] Q. Do you know how frequently Mr. Norman Chandler is at his office, and I take it he has an office at "The Times" Building, do you know how frequently he is at his office?

A. Mr. Norman Chandler, to the best of my knowledge and belief, is at his office every day, every business day.

Q. Do you know how late he stays there?

A. I couldn't say. I think that depends to some extent upon the immediate requirements upon his time.

A. Is Mr. Norman Chandler's office on the same floor or in the same part of "The Times" plant that Mr. Harry Chandler's office is located?

A. That is correct.

Q. Are they adjacent?

A. Not immediately adjacent but within two doors of it.

Q. And is that in what is known as the Editorial Department of the paper?

A. No, sir, it is on a different floor.

Q. What floor is the Editorial Department on?

A. The third floor.

Q. On what floors do the Messrs. Chandler have their offices?

A. On the fourth floor.

Q. The business office as such is on the ground floor, is it not?

A. A part of the business of "The Times" is conducted on the ground floor, part of it on the second floor and others elsewhere in the building.

Q. About what time of the day, afternoon or evening is the first edition of "The Times" laid out and gotten ready for publication, printing?

[fol. 136] A. That is outside of my jurisdiction, at present. However, the first edition of "The Times" appears on the street between 5:30 and 6:00 in the evening, which would mean that it would be in process of assembling for 45 minutes or an hour prior to that time.

Q. In the event Mr. Harry Chandler or Mr. Norman Chandler should not be at their offices in "The Times" when that first edition appears, do you know whether or not a copy of it is sent to them if they are in the city and in their homes?

A. Not to my knowledge.

Q. Do you know of anybody connected with "The Times" that would be able to tell us whether or not a copy of the first edition is sent to Mr. Harry Chandler and Mr. Norman Chandler in the event they should not be at "The Times" plant when it is published?

A. Presumably, if a special order is in effect to cause such copies to be delivered, the circulation manager would be notified of it.

Q. Who is the circulating manager?

A. Mr. Karl Marks—his last name is Marks, but I am not sure of his first name.

Q. Do you know whether or not any proofs of editorials or any other reading matter are sent to the office of Mr. Harry Chandler or Mr. Norman Chandler just before any edition of the paper in which it is proposed to have that matter appear is published?

A. Very seldom is an editorial proof sent to the office of either officer just prior to its intended publication. If it is a matter on which it is desired their judgment or criticism [fol. 137] or opinion, it is usually sent up far enough ahead so that they will have time to consider it.

Q. Are there special editorials referred to Mr. Norman Chandler?

A. Not often to Mr. Norman Chandler unless he has expressed a particular interest in that particular subject. Usually they go to Mr. Harry Chandler.

Q. Do most of the editorials which it is proposed to have appear in the paper go to Mr. Harry Chandler?

A. Very few of them go to Mr. Harry Chandler in proof.

Q. Do you know whether the editorial entitled "Probation for Gorillas" went to Mr. Harry Chandler before it appeared?

A. It did not.

Q. Do you know whether he was in the city at the time that appeared?

A. I don't recall whether he was or not.

Q. Like every newspaper, I take it for granted that "The Times" has certain well-known editorial policies, does it not? You have been with the publication for approximately 30 years, that is a fact, is it not, Mr. Trueblood?

A. That is correct.

Q. And I take it you are familiar with the editorial policies of "The Times" that have been developed over that period of time or which might have been in existence when you first went to work for "The Times," is that right?

A. In a general way I would say that is correct.

Q. Have you had occasion to discuss with Mr. Harry Chandler the matter of what the policy of "The Times" and its editorial page shall be with respect to the activity of persons who are involved in labor disputes or controversies between employer and employees here in California?

[fol. 138] A. I have discussed the general subject with him on numerous occasions, but not with reference to any specific editorial.

Q. Has he told you what the general policy of "The Times" shall be on that matter?

A. It has not been necessary for many years.

Q. What has been the general policy of "The Times" on that for many years?

A. The general policy of "The Times" on—that is so inclusive a question that perhaps the best I can say is that our policy has been to uphold the principle of the open shop as we understand it and to the best of our ability.

Mr. Luddy: Mr. Cosgrove, you served upon us an affidavit of Harry Chandler. I don't know whether it has been officially filed or not. Has it?

Mr. Cosgrove: It is in the file.

By Mr. Luddy:

Q. Are you familiar with the contents of the Harry Chandler affidavit which has been filed here?

A. May I examine it?

Q. Surely. It is dated Jun[illegible]8, 1938. It is the only affidavit in the file, as I unders[illegible]d it, by Mr. Harry Chandler.

Mr. Cosgrove: That is right.

The Witness: Yes, sir. I am familiar in a general way with the contents of this affidavit.

By Mr. Luddy:

Q. And would you say that that editorial correctly states the policy of "The Times" as you know it—not editorial, but this affidavit correctly states the policy of "The Times" and of Harry Chandler?

A. I would say so.

Mr. Luddy: I think then as long as you have filed it here and intend, I suppose, to introduce it, I suppose we might just as well have the original considered as introduced now. [fols. 139-140] Mr. Cosgrove: Yes, I think the statement of the witness that the affidavit represents the editorial policy of the paper, and the affidavit being a part of the record and in evidence——

By Mr. Luddy:

Q. What do you call that part of the editorial page which appears daily on the editorial page just above the leading or first editorial?

A. That is commonly referred to as the "masthead".

Mr. Cosgrove: The defendants will stipulate that the masthead appearing in the issue of June 16, 1938, which counsel is about to offer into evidence is a copy of the masthead that appeared in each of the issues in which these various editorials appear which are the subject of this investigation.

Mr. Luddy: We will then just introduce into evidence this one copy of the editorial page, having in mind the only portion we desire in evidence is the portion which constitutes the masthead.

Mr. Judge Pacht: Will you identify it by date?

Mr. Luddy: It is in the stipulation.

The Court: Exhibit 1.

By Mr. Luddy:

Q. I think you have already testified, Mr. Trueblood, that there are three or four or several men who work under your direction and supervision whose duty it is to write editorials, is that right?

A. Yes.

Q. In the event that a new person is employed to write editorials or one of those previously employed is discharged, who does the hiring and firing of that particular person?

A. The incident has not arisen since the present set-up was inaugurated so I would not be able to answer that question. I presume there would be a consultation between [fol. 141] myself and the managing editor in a case of that kind.

Q. It has not been necessary to hire or fire an editorial writer since you returned from your sick leave?

A. That is correct.

Q. Prior to the time you went upon your sick leave if an editorial writer was employed or one discharged, who did the hiring and firing?

A. I would have done that.

Q. Who hired you?

A. Mr. Harry Andrews, who was the managing editor of "The Times."

Q. Who do you recognize as having the right to fire you?

A. At present, you mean?

Q. Yes.

A. Mr. Harry Chandler.

Mr. Luddy: That is all on the first counts.

Mr. Crosgrove: There is no cross-examination of the witness.

The Court: That is all.

Mr. Luddy: Then may we now continue with the witness on the second action?

Mr. Cosgrove: It will be agreeable but I think it may be confusing.

The Court: I think so, Mr. Luddy. You better postpone that until we finish this. If you will just tell him to remain.

By Mr. Luddy:

Q. You will remain here in court, will you, Mr. Cosgrove?

A. Yes, sir.

Mr. Luddy: Thank you. Mr. Cosgrove, I think that you and I had conferences and also a little correspondence about [fol. 142] some documents or papers that you said you would produce without the necessity of our subpoenaeing the secretary of the corporation and would also have available someone who actually does the duties of secretary of the corporation. Do you have that person here?

Mr. Cosgrove: Yes, that is correct. You sent me a letter and I am agreeable to have the letter introduced in evidence. Mr. Downing is here, assistant secretary, I handed the letter to him and he has made an effort to produce the record evidence which you asked. You may call him. Mr. Downing.

(Mr. Harris E. Downing was sworn.)

Judge Pacht: May it please your Honor, before Mr. Downing is interrogated, may I suggest that it may save some time if we have the morning recess now to enable us to examine the particular records that Mr. Downing has produced. It may be that we could dispense entirely with his testimony and in any event shorten it considerably.

The Court: Very well. Five minutes recess.

(After recess the following proceedings were had.)

Judge Pacht: We have decided, if the court please, that it is unnecessary to bother Mr. Downing with reference to any of these minutes or by-laws so if we may we would like to excuse him.

The Court: Very well. You are excused.

Judge Pacht: Thank you very much, Mr. Cosgrove, for making it possible for us to have these in court.

Mr. Luddy: If the court please, then we rest with respect to any further evidence on the so-called first count, the first cause.

The Court: The first case.

Mr. Luddy: The first case. I will get it right after awhile.

Mr. Cosgrove: We will call Mr. Norman Chandler.

[fol. 143] Defense

Norman Chandler, called as a witness by and on behalf of the defendants herein, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Norman Chandler.

Direct examination.

By Mr. Cosgrove:

Q. Mr. Chandler, you are the vice-president and general manager of "The Los Angeles Times"?

A. Yes, sir.

Q. And have been as far back at least as December 1, 1937?

A. That is correct.

Q. And prior to that time and at all times subsequent to December 1, 1937?

A. Yes, sir.

Q. Since this contempt proceeding was instituted have you had occasion to read this editorial which is the subject of the first count and which is entitled "Sit Strikers Convicted"?

A. I read the editorial after it was published but that is the only time.

Q. Mr. Chandler, did you see it before it was published?

A. No, sir.

Q. Did anybody speak to you about it before it was published?

A. No, sir.

Q. Did you know it was going to be published?

A. No, sir.

Q. And with reference to the editorial which forms the subject matter of the first count of the proceeding which is entitled "The Fall of an Ex-Queen," and relates to Mrs. Helen Werner, I will ask you to state whether or not you read that editorial.

[fol. 144] A. I read it after it was published.

Q. Did you see it before it was published?

A. No, sir.

Q. Did anyone discuss it with you before it was published?

A. No, sir.

Q. Did you know it was going to be published?

A. No, sir.

Mr. Cosgrove: You may cross-examine. Just a minute, please. I beg pardon. Calling your attention to the fifth count of the proceeding which relates to an editorial entitled "Probation for Gorillas", I will ask you if you read that editorial.

A. I read it after it was published.
Q. Did you read it before it was published?
A. No, sir.
Q. Did you know it was going to be published?
A. No, sir.
Q. Did anybody talk to you about its preparation or publication?
A. No, sir.

Mr. Cosgrove: You may cross-examine.

By Judge Pacht:

Q. Mr. Chandler, you have been, at least since you have become vice-president and general manager of "The Times", in rather close touch with your father as it appertains to his views concerning the conduct of the paper, its policies?

Mr. Cosgrove: Objected to as calling for the conclusion of the witness, speculation on the part of the witness and not cross-examination.
The Court: Sustained.
Judge Pacht: No cross-examination.
The Court: That is all.
The Witness: Do you need me any further?
Judge Pacht: Not so far as we are concerned, Mr. Chandler.
Mr. Cosgrove: Yes, there is another case coming on. I will call Mr. Hotchkiss.

[fol. 145] L. D. Hotchkiss, called as a witness by and on behalf of the defendants, being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?
The Witness: L. D. Hotchkiss.

Direct examination.

By Mr. Cosgrove:

—. You are the L. D. Hotchkiss that appears as one of the respondents in this proceeding?
A. I am.

Q. Calling your attention, Mr. Hotchkiss, to an editorial which forms the first count, the subject matter of the first count of the present proceedings, contempt proceedings, and it is entitled "Sit Strikers Convicted," I will ask you if you are familiar with the editorial?

A. I am.

Q. You have read it?

A. I have.

Q. Do you know who prepared it?

A. I believe Mr. Krauss, Mr. Edward Krauss prepared it.

Q. And under whose direction?

A. Under my direction.

Q. Did you see it after it was prepared?

A. I did.

Q. Did you approve of it?

A. I did.

Q. And authorized it being placed in the issue of "The Times?"

A. I did.

Q. Of date about December 21st?

A. I believe that was the date.

Q. Did you consult Mr. Harry Chandler about this editorial?

A. I did not.

[fols. 146-168] Q. Do you know whether he saw it or not?

A. I do not know.

Q. Did he ever prior to its publication discuss it with you?

A. He did not.

Q. Did Mr. Norman Chandler?

A. No, sir.

Q. Calling your attention to an editorial which is entitled "The Fall of an Ex-Queen" and relates to Mrs. Helen Werner, which is the subject of the third count of this proceeding, I will ask you to state whether you had anything to do with its publication?

A. I had not.

Q. Were you consulted about it prior to its publication?

A. I was not.

Q. I call your attention to an editorial forming the subject matter of the fifth count entitled "Probation for Gorillas" and ask you to state if you read it.

A. I have.

Q. Did you read it before its publication?

A. After its publication.

Q. Did you have anything to do with its publication?

A. I did not.

Q. Did anybody consult you about it?

A. They did not.

Mr. Cosgrove: You may cross-examine.

Judge Pacht: No cross-examination, your Honor.

The Court: That is all.

Mr. Cosgrove: You may step aside. That is all the defendants have, your Honor.

The Court: Any rebuttal?

Judge Pacht: None, your Honor.

* * * * * * *

[fol. 169] STATEMENT

Mr. Cosgrove: If your Honor please, Judge Pacht said, or at least I understood him to say, that he thought it was not necessary, it would not be necessary to argue the case, and I agree with that. I would state my position to the effect it would not be justified. We argued here at great length and had ample opportunity to present and the court heard us with far more than ordinary patience and what appeared to me to be with more than ordinary attention. What was said reflected our best thought and stated, having in mind our limited facility of stating it, more persuasively than we could now state it, our position. We have read the decision of the court with much interest and I dare say with some considerable instruction and we appreciate that it represents on your Honor's part, as our efforts represented on our part, your very best efforts after hearing both sides of this matter and after giving the matter your mature, conscientious consideration, and we respect your opinion as such. We make this statement not only out of appreciation for the courteous consideration which we have been shown here, but the straight-forward and convincing manner in which your Honor has handled it. We have nothing further to say excepting this, that it might not have

been proper to say it upon argument, it may be proper to say it now, that these gentlemen whom we produced here this morning and who stated the facts as they know them, entertain conscientious, sincere belief that what they were doing was merely in compliance with what they understand to be the duty of a newspaper in publishing and intelligently commenting on the news, and I think that no one could sit here and hear the testimony of Mr. Trueblood without being convinced that the man honestly and sincerely be- [fol. 170] lieved that what he was doing was within the scope of his authority and I think that he convinced the court as he has always convinced me in my dealings with the man for many years, that he is an honest, sincere individual, and that he had no more idea of being in contempt of court than I have in appearing here on their behalf and urging, as I may be able to do, the law in support of what they believed and what I might say I honestly believe to be their right. They did not have any advice prior to the publication of these articles but I don't wish to have your Honor think that they would have done differently if I had the opportunity of advising them, for I honestly and sincerely believed and with great deference to the court I still honestly believe that with the possible exception of one of these editorials that they did not commit a contempt of court, but at the same time that like any other matter that is contested in the court is one in which counsel may have honest differences of opinion. We occasionally run into the fact, peculiar as it may be, that the Supreme Courts of the states do not always agree on these matters.

With reference to the liability of these particular individuals I am not going to make any argument. Mr. Hotchkiss was placed upon the stand by myself, took full responsibility for authorizing the publication of the first article, causing it to be prepared and approving it after it was prepared and causing it to be published, and Mr. Chandler with reference to the last two articles was consulted by Mr. Trueblood and saw the articles before they were printed and they were printed with his entire approval and accord. With reference to Mr. Norman Chandler I think that this being a criminal case, having in mind the intent must pre- [fol. 171] vail, I think there is an entire absence of any evidence that in any manner connects the gentleman with any of the editorials. I think the same is true with refer-

ence to Mr. Hotchkiss, clearly so with the exception of the very last editorial, the one in which Mr. Trueblood said to him in meeting him in the hallway that he was going to publish another editorial, but he didn't see it, didn't know anything about its contents, and in a civil action I don't think a man is liable for a crime even if he apprehends that one is about to be committed if he does not in any manner participate in it. But we are glad to leave that to the decision of the court.

FINDINGS

The Court: So far as the law is concerned I think it is set forth in considerable length in the Opinion that I filed and it would serve no purpose to say anything further or to repeat anything that is stated in the Opinion.

In the first case, No. 428-920, the court finds the respondent, The Times-Mirror Company, guilty upon Counts 1, 3 and 5, and imposes a fine of $100.00 on Count 1, $100.00 on Count 3 and $300.00 on Count 5.

The court finds Mr. Harry Chandler and Mr. Norman Chandler not guilty as to all three counts, that is, Counts 1, 3 and 5 of that proceeding; finds Mr. Hotchkiss guilty of Count 1 and imposes a fine of $100.00 with the alternative of one day in jail for each $2.00 that remains unpaid and finds Mr. Hotchkiss not guilty on Counts 3 and 5.

In the second proceeding, No. 429-179, the court finds the respondent, The Times-Mirror Company, guilty on both counts and imposes a fine of $100.00 as to each; finds Mr. Harry Chandler guilty on both counts and imposes a fine of $100.00 as to each count, with the same alternative of one [fols. 172-177] day in jail for each $2.00 of the fine remaining unpaid; finds Mr. Norman Chandler not guilty as to both counts and finds Mr. Hotchkiss not guilty as to Count 1, guilty as to Count 2, and imposes a fine of $50.00 as to that count, with the same alternative.

Mr. Luddy: Has your Honor made a ruling on the second cause, as to the Times-Mirror?

The Court: Yes, guilty as to both.

Mr. Cosgrove? Now, if the court please, might we have an exception noted to the ruling of the court on all counts in both cases?

The Court: Very well. The exception will be noted.

[fol. 178] "In the Superior Court of the State of California in and for the County of Los Angeles

No. 428920

Present Hon. Emmet H. Wilson, Judge

July 5, 1938.

In the Matter of The Times-Mirror Company et al., Respondents

Order Overruling Respondents' Objections etc.

Order to show cause in re contempt and demurrer to order to show cause come on for hearing; Cosgrove & O'Neil and F. B. Yoakum appearing as attorneys for the respondents; Allan W. Ashburn, Michael G. Luddy, Isaac Pacht and Arnold Praeger for the Bar Association; and Gallagher, Wirin & Johnson in amicus curiae. Tom Cecil, Reporter from 10:00 A. M. to 4:30 P. M. Respondents' motion that this proceeding be entitled "People of the State of California vs. The Times Mirror Company, a corporation, Harry Chandler, Norman Chandler and L. D. Hotchkiss, respondents in contempt" is denied. Respondents' motion that the Court direct that the District Attorney for the County of Los Angeles and the Attorney General for the State of California be notified of this proceeding, and for an Order directing that no other or further proceeding be had or taken herein until said District Attorney or said Attorney General shall appear herein as attorney for the prosecution of this proceeding is denied. Respondents' objections to any party other than the State of California prosecuting this proceeding, objection to any attorney appearing or acting or being permitted to appear or act as prosecuting attorney herein other than the Attorney General of the State of California or District Attorney of Los Angeles County are overruled. Respondents' objection to [fols. 179-181] the Los Angeles Bar Association or any committee of said Association or any one appearing or claiming to appear as attorney for said Association, or for any committee of said Association, appearing or acting or being permitted to appear or act as attorney or attorneys for the prosecution of this proceeding is overruled. Respondents' objection to any proceeding being taken herein

unless and until the People of the State of California are made a party hereto and appear herein by the proper officer of said State in that behalf duly authorized is overruled. Respondents' objection to the Los Angeles Bar Association or any committee of said Association or anyone appearing or claiming to appear as attorney for said association or for any committee of said association, controlling or directing, either as attorney of record or otherwise, this prosecution, is overruled. Respondents except. Matters are continued to July 6, 1938, at 2 P. M.

I certify the foregoing to be a full, true and correct copy of an order entered on the minutes of said Superior Court, Department 34, in the above entitled cause.

Attest my hand and the seal of the said Superior Court, this 11th day of July, 1938.

L. E. Lampton, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by Elsie Possner, Deputy. (Seal.)"

[fol. 182] MINUTE ENTRIES OF ARGUMENT

"Wednesday, July 6, 1938. Department 34

Convened at 10:00 A. M., present: Hon. Emmet H. Wilson, Judge; J. E. Shaw, Deputy Clerk; C. W. Males, Deputy Sheriff; and the following proceedings were had:

428920

In the Matter of THE TIMES MIRROR COMPANY

Order to show cause in re contempt, demurrer to order to show cause and to affidavit of J. Lewis Elkins are resumed with all parties present as before. Tom Cecil, Reporter from 2:00 P. M. to 5:00 P. M. Argument is resumed and further hearing is continued to July 7, 1938, at 10:00 A. M.

* * * * * * *

The foregoing Minutes of Department 34 are correct.

J. E. Shaw, Deputy."

"Thursday, July 7, 1938. Department 34

Convened at 10:00 A. M., present: Hon. Emmet H. Wilson, Judge; J. E. Shaw, Deputy Clerk; C. W. Males, Deputy Sheriff; and the following proceedings were had:

[fol. 183] 428920

In the Matter of The Times Mirror Company

Order to show cause in re contempt, demurrer to order to show cause and to affidavit of J. Lewis Elkins are resumed for hearing with all parties present as before. Tom Cecil, Reporter from 10:15 A. M. to 4:45 P. M. Argument is resumed and further hearing is continued to July 8, 1938 at 11:00 A. M.

* * * * * * *

The foregoing Minutes of Department 34 are correct.
J. E. Shaw, Deputy."

[fol. 184] "Friday, July 8, 1938. Department 34

Convened at 10:00 A. M., present: Hon. Emmet H. Wilson, Judge; J. E. Shaw, Deputy Clerk; C. W. Males, Deputy Sheriff; and the following proceedings were had:

428920

In the Matter of The Times Mirror Company

Order to show cause in re contempt, and demurrer to order to show cause and to affidavit of J. Lewis Elkins are resumed for hearing with all parties present as before, and Carey McWilliams, Hubert Ganahl, Harry G. Balter and Lee Stanton in amicus curiae representing the National Lawyers Guild. Tom Cecil, Reporter from 11:00 A. M. to 5:00 P. M. Argument is resumed and continued to July 11, 1938 at 10:30 A. M.

* * * * * * *

The foregoing Minutes of Department 34 are correct.
J. E. Shaw, Deputy."

[fol. 185] "Monday, July 11, 1938. Department 34

Convened at 10:00 A. M., present: Hon. Emmet H. Wilson, Judge; J. E. Shaw, Deputy Clerk; C. W. Males, Deputy Sheriff; and the following proceedings were had:

* * * * * * *

428920

In the Matter of THE TIMES MIRROR COMPANY

Order to show cause in re contempt, and demurrer to order to show cause and to affidavit of J. Lewis Elkins are resumed for hearing with all parties present as before, except Carey McWilliams. E. R. Perry, Reporter from 10:30 A. M. to 5:00 P. M. Argument is resumed and continued to July 12, 1938, at 10:00 A. M.

* * * * * * *

The foregoing Minutes of Department 34 are correct.
J. E .Shaw, Deputy."

[fol. 186] "Tuesday, July 12, 1938. Department 34

Convened at 10:00 A. M., present: Hon. Emmet H. Wilson, Judge; J. E. Shaw, Deputy Clerk; C. W. Males, Deputy Sheriff; and the following proceedings were had:

* * * * * * *

428920

In the Matter of THE TIMES MIRROR COMPANY

Hearing is resumed with all parties present as before. Tom Cecil, Reporter from 10.00 A. M. to 4:30 P. M. Argument is resumed and continued to July 13, 1938, at 10:30 A. M.

* * * * * * *

The foregoing minutes of Department 34 are correct.
J. E. Shaw, Deputy."

"Wednesday, July 13, 1938. Department 34

Convened at 10:00 A. M., present: Hon. Emmet H. Wilson, Judge; J. E. Shaw, Deputy Clerk; C. W. Males, Deputy Sheriff; and the following proceedings were had:

* * * * * * *

428920

In the Matter of THE TIMES MIRROR COMPANY

Hearing is resumed with all parties present as before. Grover Summers, Reporter from 10:30 A. M. to 5:00 P. M. Argument is resumed and continued to July 14, 1938, at 10:00 A. M.

* * * * * * *

[fol. 187] The foregoing Minutes of Department 34 are correct.

J. E. Shaw, Deputy."

"Thursday, July 14, 1938. Department 34

Convened at 10:00 A. M., present: Hon. Emmet H. Wilson, Judge; J. E. Shaw, Deputy Clerk; C. W. Males, Deputy Sheriff; and the following proceedings were had:

* * * * * * *

428920

In the Matter of THE TIMES MIRROR COMPANY

Hearing is resumed with all parties present as before, except A. L. Wirin. Dave Little, Reporter, from 10:10 A. M. to 12:00 A. M. Argument is resumed. Matter is submitted.

* * * * * * *

The foregoing Minutes of Department 34 are correct.

J. E. Shaw, Deputy."

[fols. 188-189] "In the Superior Court of the State of California in and for the County of Los Angeles

Present Hon. Emmet H. Wilson, Judge

August 18, 1938.

No. 428920

In the Matter of The Times-Mirror Company, et al.

Order on Demurrer

Demurrer heretofore submitted is sustained without leave to amend as to Counts 2 and 4; overruled as to Counts 1, 3 and 5; 5 days allowed defendants to answer. The contempt proceedings are set for August 25, 1938, at 10 A. M. in Department 34.

I certify the foregoing to be a full, true and correct copy of an order entered on the minutes of said Superior Court, Department No. 34, in the above entitled cause.

Attest my hand and the seal of the said Superior Court, this 24th day of August, 1938.

L. E. Lampton, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles. By C. M. Baker, Deputy." (Seal.)

[fols. 190-191] "In the Superior Court of the State of California in and for the County of Los Angeles

Present Hon. Emmet H. Wilson, Judge

August 25, 1938.

No. 428920

In the Matter of The Times-Mirror Company, et al.

Judgment

Cause called for trial; Allan W. Ashburn, Michael G. Luddy, Isaac Pacht and Arnold Praeger appearing as attorneys for the Bar Association; Cosgrove & O'Neil for the respondents; Al Wirin in amicus curiae for the American

Civil Liberties Union. Pauline Ross, Reporter from 10:05 A. M. to 3:30 P. M. Ralph W. Trueblood is sworn and testifies for the petitioner. Horace E. Downing is sworn but does not testify. Petitioner's Exhibit No. 1 (Portion of the Times) is received and filed. Petitioner rests. Norman Chandler and L. D. Hotchkiss are sworn and testify for the respondent. Respondent rests. Cause is argued. The Times-Mirror Company is found guilty on Counts Nos. 1, 3 and 5 and is fined $100.00 each on Counts 1 and 2, $300.00 on Count 3. Harry Chandler and Norman Chandler are found not guilty. L. D. Hotchkiss is found guilty on count 1 and is fined $100.00; in lieu of payment thereof to serve one day in the County Jail for each $2.00 of the unpaid balance; respondent excepts. 30-day stay of execution is granted. L. D. Hotchkiss is found not guilty on Counts Nos. 3 and 5.

I certify the foregoing to be a full, true and correct copy of an order entered on the minutes of said Superior Court, Department No. 34, in the above entitled cause.

Attest my hand and the seal of the said Superior Court, this 26th day of August, 1938.

L. E. Lampton, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles. By Elsie Possner, Deputy. (Seal.)"

[fol. 192] 7. The opinion hereinafter set forth is a full and correct copy of the opinion rendered by the trial court in the proceedings herein under review:

"In the Superior Court of the State of California in and for the County of Los Angeles

No. 428920 and No. 429179

In the Matter of The Times-Mirror Company, a Corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, Respondents, In Contempt

Opinion

For Los Angeles Bar Association, Allen W. Ashburn, Michael G. Luddy, Isaac Pacht, and Arnold Praeger.

For Respondents, Cosgrove & O'Neil, T. B. Cosgrove, and F. B. Yoakum, Jr.

Amicus curiae for American Civil Liberties Union, A. L. Wiring.

The respondents are charged, in two separate proceedings, by a committee of the Los Angeles Bar Association, through an affidavit of J. Louis Elkins, Executive Secretary of the Association, with contempt of court, in that they are alleged to have published editorials in the Los Angeles Times concerning actions pending in this court and undetermined at the time the publications were made, which editorials were intended by respondents and were in and of themselves calculated and had an inherent tendency to in- [fol. 193] terfere with, influence, sway, and control the proceedings and interfere with, sway, control, embarrass, and influence the actions and decisions of the judges before whom the respective actions were pending in connection with rulings or orders to be made subsequently to the date of the publication of the respective editorials.

The affidavit in No. 428920, hereinafter referred to as the first proceeding, contains five counts, each count setting up a separate article or editorial published in the Los Angeles Times. The affidavit in No. 429179, referred to hereinafter as the second proceeding, contains two counts, each based upon a different editorial published in the same newspaper concerning the first proceeding within a few days after the citation for contempt was issued therein.

The respondents have demurred in each proceeding to the order to show cause and to the affidavit upon which the same was based, all of them relying upon the constitutional guaranty of freedom of the press, and the individual respondents raising the additional point that the affidavits are fatally defective in that there is no allegation that they personally caused or personally permitted the publication of the editorials set forth in the two affidavits.

As to the individual respondents, it is alleged that the respondent, The Times-Mirror Company, at all times mentioned in the affidavits was the publisher of the Los Angeles Times, a daily newspaper printed, published and circulated in the city of Los Angeles; that the respondent, Harry Chandler, is and was the president and the respondent, Norman Chandler, the General Manager of the said The Times-Mirror Company, and that the respondent, L. D.

Hotchkiss, is and was the managing editor of the said Los [fol. 194] Angeles Times. The allegation as to publication is the same in each count of each proceeding: that on and before the date of publication there was pending and undetermined and known to the respondents and each of them to be pending and undetermined in this court a certain action (giving title and number); that on the date of publication "the respondents, The Times-Mirror Company, a corporation, Harry Chandler, Norman Chandler, and L. D. Hotchkiss, and each of them, caused to be printed and published and circulated in the city of Los Angeles and elsewhere an issue of said Los Angeles Times; that in said issue of said Los Angeles Times, there was printed and published a certain editorial" (giving title and text verbatim).

In the case of Otis v. Superior Court, 148 Cal. 129, 82 Pac. 853, a judgment of contempt was annulled upon the ground that the affidavit upon which the petitioners Otis and Chandler were cited did not connect them with the publication either by direct averment that they were the publishers or by any statement of fact leading to that conclusion. The affidavit alleged that H. G. Otis was the president and general manager of The Times-Mirror Company, the publisher and printer and of the newspaper, and that Harry Chandler was the vice-president and assistant general manager of the said company. There was no allegation that they published or caused to be published the offending articles or the newspaper in which they appeared. The court said: "To make the petitioners liable in contempt for matter appearing in the Times, it was necessary to show, and therefore essential to charge, that they personally caused, or, being in control, at least permitted, the publication of the articles in question". The affidavits in these proceed- [fol. 195] ings expressly charge that the respondents and each of them caused to be printed and published and circulated an issue of the Los Angeles Times and that in said issue there were printed and published the articles concerning which complaint is made.

The allegation that the individual respondents caused the newspaper, the entire paper, to be printed and published and that the editorials in question were printed and published in the said newspaper is a sufficient charge that they caused each separate article and editorial therein to be printed and published.

The respondents all claim immunity by reason of section 9 of Article I of the Constitution of California and the First and Fourteenth Amendments to the Constitution of the United States which guarantee freedom of speech and of the press.

Freedom of the press and freedom of speech, which are safeguarded by the First Amendment against federal action, are among the fundamental personal rights and liberties of citizens that are protected by the due process clause of the Fourteenth Amendment from invasion, impairment, or abridgement by state action. (Lovell v. City of Griffin, (U. S.) 82 L. Ed. Ad. Op. 660, 58 S. Ct. Adv. Op. 666; Gitlow v. New York, 268 U. S. 652, 666, 69 L. Ed. 1138, 45 S. Ct. 625; Near v. Minnesota, 283 U. S. 697, 707, 75 L. Ed. 1357, 51 S. Ct. 625; Grosjean v. American Press Co., 297 U. S. 233, 244, 80 L. Ed. 660, 56 S. Ct. 444; De Jonge v. Oregon, 299 U. S. 353, 364, 81 L. Ed. 278, 57 S. Ct. 255; Stromberg v. California, 283 U. S. 359, 368, 75 L. Ed. 1117, 51 S. Ct. 532, 73 A. L. R. 1484. Compare Fiske v. Kansas, 274 U. S. 380, 71 L. Ed. 1108, 47 S. Ct. 655, and Whitney v. California, 274 U. S. 357, 71 L. Ed. 1095, 47 S. Ct. 641.)

[fol. 196] But these rights, protected though they are by both federal and state constitutions, do not confer an absolute right to speak and to publish without any responsibility, whatever one may choose to say or to print, or an unrestricted and unbridled license, nor do they give immunity for every possible use of language or prevent the punishment of those who abuse these rights. Reasonably limited this freedom is an inestimable privilege in a free government, but without limitation it might become a scourge to state or nation. (Gitlow v. New York, supra; Whitney v. California, supra; Stromberg v. California, supra.)

The right of the press is unquestioned to publish matters and happenings of a public nature and to discuss and comment fairly upon them, but that right, as is every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing. Freedom of the press does not imply the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including the press, depends. (Toledo Newspaper Co. v. United States, 247 U. S. 402, 62 L. Ed. 1186, 38 S. Ct. 560.) It is important to the public that the press should be restricted as little as possible, but it is

equally important that the due administration of justice should not be interfered with by newspaper comments which have a tendency to bias or influence the court in favor of one party or the other.

The freedom of the press vouchsafed by the Constitution implies the publisher's respect for the equal rights of others. One of those rights that the publisher is bound to respect is a litigant's privilege of appearing before an independent, imparital court for judicial redress, uninfluenced and [fol. 197] unembarrassed by partisan publications concerning pending litigation. Under the constitution this right is as sacred as the freedom of the press. By both state and Federal constitutions government is composed of distinct legislative, executive and judicial departments of equal rank. The judiciary is an independent tribunal to which the individual may resort whenever his property rights are invaded by private wrongdoers, by public agencies, or by the legislative or the executive department. In controversies over rights guaranteed by the constitution the individual stands before the court on an equality with government itself. The constitutional provision creating an independent juridicary is recognized by historians, philosophers, and statesmen as a vast contribution to the science of government. To preserve the purity, the impartiality, and the independence of the court is a solemn duty that cannot be evaded without endangering all constitutional rights, the freedom of the press with the others. (State v. Lovell, 117 Neb. 710, 222 N. W. 625.)

The aegis of free speech has never been sufficiently broad to cover license. The freedom that is guaranteed by the constitution freely to write and to publish upon all subjects is qualified by the provision that imposes responsibility for the abuse of that freedom. License is not to be mistaken for liberty. Neither under the alluring guise of a plea for the freedom of the press nor behind a screen of emotive phrases may a publisher escape responsibility for his acts. The powerful influence of the press in the affairs of modern civilization is recognized and extolled by all thinking people, but when it clearly appears that an attempt is made to use that potent agency to nullify a lawful exercise of the func- [fol. 198] tions of the judiciary, as those functions relate to a cause then presently pending and undetermined, the hand of punitive justice may properly be applied. (Bee Publishing Co. v. State, 107 Neb. 74, 185 N. W. 339.) Liberty of

the press is subordinate to the independence of the judiciary, and it is not expedient that any class in the community should be privileged to interfere with the rights of litigants or to embarrass or obstruct the administration of justice. (In re Independent Publishing Co., 240 Fed. 849, 862.) Freedom of speech and of the press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business or property. (State v. McKee, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542.)

Anyone who loves his country, its liberty, and its institutions, and who esteems the protection which the constitution affords, cannot avoid an emotion of alarm at the persistent attempt, by regulation and by prohibition, to curtail personal rights and privileges that heretofore have been considered sacred and secure.

By reason of the continual flow of propaganda on the one hand and of the effort to restrain and to censor publication on the other, the necessity for a free and untrammeled press and for a full discussion of public matters of every kind is more important today than in any previous period in the history of the nation. Nevertheless the right of freedom of publication and freedom of speech is not an unlimited and unrestrained right and does not license the publication of criticism and comment at such times or in such manner as to obstruct or to contaminate the pure stream of justice.

[fol. 199] Fair comment and even criticism, both of a judgment rendered by the court and of the reasoning leading to a judgment, may be indulged in and no court or judge ought to object to impartial and just comment. But while an action is pending and undetermined and as long as there remains before the court any matter to be decided in a case, there can be no criticism or comment, either favorable or unfavorable, that will be likely to have a tendency to influence the court. The right freely to comment and criticize the actions, opinions, and judgments of courts is of primary importance to the public generally. It is not only good for the public but has a salutary effect on the judges as well. Courts and judges are not and should not be above criticism and as long as they are not impeded in the conduct of judicial business by publications having the direct tendency and effect of obstructing the enforcement of their orders and judgments or of impairing the justice and im-

partiality of verdicts, there can be no resort to contempt proceedings against the publisher. There is no question as to the right to criticize and censure the conduct of courts and parties when causes have been finally decided. Publishers of newspapers have the right, but no higher right than others, to bring to public notice the conduct of courts and parties, whether upright or blameworthy, after the decision has been made, if the publications are true and fair in spirit. (Sturoc's Case, 48 N. H. 428, 97 Am. Dec. 626.) If the published criticisms of the court or judge are for past actions and orders, and if the matter with which the criticism has to do has been finally adjudicated and the proceedings are ended so that the carrying out of the court's judgment cannot be obstructed, the publications are not contemptuous. (Nixon v. State, 207 Ind. 426, 193 N. E. 591, 97 A. L. R. 894.) [fol. 200] An address to the public is an address to the court. When articles calculated to interfere with the fair trial of a cause, and thus to obstruct justice, are so published and circulated, it is not necessary, in order to constitute them contempts, that they actually reach the eyes of the court or jury. (In re Lindsley, 75 Cal. App. 122, 241 Pac. 934; State v. Howell, 80 Conn. 668, 672, 69 Atl. 1057, 125 Am. St. Rep. 141; Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528.) And it is not essential in order to constitute contempt to show that the actions of the court or of the judge were actually influenced by the utterances of the petitioner. (In re Shuler, 210 Cal. 377, 404, 292 Pac. 481.) In the case of In re Shortridge, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755, the Supreme Court said: "Liberty of the press must not be confounded with mere license. Liberty of the press stops where a further exercise would invade the rights of others. This provision of the constitution does not authorize a usurpation of the functions of the courts. Under the plea of the liberty of the press a newspaper has no right to assail litigants during the progress of a trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion of the merits of cases which are on trial. As stated before, what may be spoken may be written, and the converse of the proposition is true that what may not be spoken under such circumstances may not be written."

Not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or to bring about the baleful result is the test. (Sinclair v. United States, 279 U. S. 749, 764, 73 L. Ed. [fol. 201] 938, 49 S. Ct. 471, 63 A. L. R. 1258; Toledo Newspaper Co. v. United States, supra.) Liberty of the press as guaranteed by the constitution does not permit publications respecting pending causes which are reasonably calculated to interfere with the due administration of justice. It is contempt to issue publications which are calculated to prejudice or prevent fair and impartial action in a cause then pending. (In re Lindsley, supra.) The publication of any article, either true or false, concerning a pending cause, that tends to impede the orderly administration of justice in that cause constitutes a contempt. (In re San Francisco Chronicle, 1 Cal. (2d) 630, 36 Pac. (2d) 369.) Constitutional guaranties of freedom of speech and of the press do not go so far as to protect the citizen in making such comment by either spoken or printed utterance with respect to causes pending before courts of justice as have for their purpose and manifest tendency an attempted interference with the orderly administration of justice before such tribunals and in respect to causes pending and in course of conduct therein. (In re Shuler, supra.) If an article is calculated to embarrass or to influence a court or to prevent a fair trial between suitors in court, either by disturbing the independent verdict of the jury or the independent and unbiased conclusion of the court, it is a contempt. (State v. Tugwell, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717.)

The essence of the offense is conduct reasonably calculated to produce an atmosphere of prejudice where a pending case is to be tried. (King v. Tibbits, 2 Br. Rul. Cas. 469.) The matter charged must have a reasonable tendency to [fol. 202] cause substantial prejudice to a party in the conduct of the action or substantially to interfere with the due administration of justice. (Hunt v. Clarke, 58 L. J. (Q. B.) 490.) The publication of an article in a newspaper printed and circulated in the place where a court is sitting, reflecting in severe terms upon the character of a criminal prosecution in court, if made at a time and in circumstances such as would naturally bring it to the notice of jurors and others who are in attendance on the court, is a contempt of court. (Sturoc's Case, supra.)

It makes no difference, in its effect upon the public, whether an article reflecting upon the court in a cause on trial, and improperly commenting upon the evidence, and disparaging the cause of one or the other of the parties, and calculated to prevent a fair trial, is published with criminal intent or with good intent. It brings contempt upon the court in the public mind, and is a contempt of court in either case. The absence of improper intent is to be considered in mitigation of the offense but not as an excuse for it. (State v. Howell, supra.)

The authorities are almost unanimous that any act or conduct or publication calculated to intimidate, influence, impede, embarrass, or obstruct courts in the due administration of justice in matters pending before them constitutes a contempt of court, and that any willful act or conduct or any publication which has a reasonable tendency to prevent a fair trial, or to influence or embarrass the judge, or to prejudice the public or the jurors against an accused person for an offense, or which tends to prejudice the rights of [fol. 203] either party to a civil action, may be punished as for contempt of court. (Lindsley v. Superior Court, 76 Cal. App. 419, 245 Pac. 212; State v. New Mexican Printing Co., 25 N. Mex. 102, 177 Pac. 751; Herald-Republican Pub. Co. v. Lewis, 42 Utah 188, 129 Pac. 624; 2 Bishop on Criminal Law (7th Ed.), sec. 259; State v. Circuit Court, 97 Wis. 1, 72 N. W. 193, 38 L. R. A. 554, 65 Am. St. Rep. 90; Cheadle v. State, 110 Ind. 301, 309, 11 N. E. 426, 59 Am. Rep. 199.) The question is not what effect the article did have but what effect it might have had.

There is no dissension in the cases that it is an inherent right and power of the courts to punish for contempt publishers of newspapers who, pending the trial of a case, print matter for public circulation which is calculated to impede, embarrass, or affect the orderly trial and disposition of the case being heard. The reason why such publication is treated as contempt of court is because the tendency, and sometimes the object, is to deprive the court of the power of doing that which is the end for which it exists,—namely, to administer justice fully, impartially, and with reference solely to the facts judicially brought before it. (Tate v. State, 132 Tenn. 131, 177 S. W. 69.)

In the case of Patterson v. Colorado, 205 U. S. 454, 462, 51 L. Ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689, Mr. Justice Holmes, writing the opinion of the court, said that the

theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open Court, and not by any outside influence, whether of private talk or public print, and what is true with reference to a jury is true also with reference to a court. If a court regards, as it may, a publication concerning a [fol. 204] matter of law pending before it as tending toward interference with the administration of the law, it may punish the offender. When a case is finished the courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied.

It is of no importance that a publication calculated to produce resistance to an order of court, which was in form and substance well adapted to influence a weak judge through fear of public abuse and ridicule, produced in the judge's mind irritation instead of fear. (Toledo Newspaper Co. v. United States, (C. C. A.) 237 Fed. 986.) On certiorari of this case the Supreme Court said that the situation is controlled by the reasonable tendencies of the acts done; that it is not necessary that there be proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publication; that having regard to the protection of society, to the honest and fair administration of justice, and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in the particular case. (Toledo Newspaper Co. v. United States, 247 U. S. 402, 62 L. Ed. 1186, 38 S. Ct. 560.) Language in the dissenting opinion of Justice Holmes was emphasized by respondents' counsel and by amicus curiae, but no case has been found wherein a majority of the Supreme Court have agreed with the dissent.

The judicial department of the government is not on a parity with its coordinate branches. The legislator and the executive may receive petitions and advice from their constituents, they may express their opinions upon any subject [fol. 205] at any time, yet they are not disqualified from acting. This freedom is forbidden ground to the judge. To learn any facts concerning a case, to discuss its merits, to hear any argument except in open court, or to express an opinion before hearing the evidence, is to disqualify him.

Neither may he go upon the public rostrum, give interviews to the newspapers, or circularize the public, in explanation or in defense of his judicial acts. The reason for his decisions must appear from the decisions themselves.

The so-called "clear and present danger" doctrine, it is argued, precludes the conviction of anyone for contempt of court unless there is an immediate danger that his utterances will have some ulterior effect upon the court or its judgment, or upon the government. This doctrine has been discussed in criminal cases but never with reference to contempt, as far as the court is advised.

In affirming a judgment of conviction of conspiracy to violate the Espionage Act and to use the mails for the transmission of unmailable matter, in Schenck v. United States, 249 U. S. 47, 63 L. Ed. 470, 39 S. Ct. 247, Mr. Justice Holmes, writing the unanimous opinion of the court, used this language: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." The statement appears to be outside the issues of the case, inasmuch as the defendants had been convicted and the conviction was therein being sustained by a unanimous court. In a dissenting opinion in Abrams v. United States, 250 U. S. 616, 630, 63 L. Ed. 1173, 40 S. Ct. 17, Justices Holmes and Brandeis said that we should be [fol. 206] eternally vigilant against attempts to check the expression of opinions "unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." And in another dissenting opinion in Gitlow v. New York, 268 U. S. 652, 69 L. Ed. 1138, 45 S. Ct. 625, the same justices restated the above quotation from Schenck v. United States and added, among other things, that "Whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Again these Justices joined in a concurring opinion in Whitney v. California, 274 U. S. 357, 373, 71 L. Ed. 1095, 47 S. Ct. 641, in which they said: "Although the rights of free

speech and assemblage are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic, or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled." Lastly, in Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 1066, 57 S. Ct. 732, in reversing a conviction under a Georgia statute which was held not to furnish a sufficiently ascertainable standard of guilt, the court, in connection with the discussion of previous cases arising under the Espionage Act in which the court had said that interference with the [fol. 207] operations of the government might be inferred from the time, place, and circumstances of the act, used the above-quoted language from the Schenck case.

In so far as appears from the arguments made in the instant case, the "clear and present danger" theory has as yet pervaded our jurisprudence no further than as indicated by the decisions and dissents above cited in criminal prosecutions under the Espionage Act and similar statutes. No case has been cited in which it has been mentioned in a contempt proceeding.

The application of this doctrine to contempt proceedings would mean that an unsuccessful attempt to influence the court would not be punishable, that only the one who prevailed in his effort would be in contempt. It would also mean that one contempt, or possibly two or more, would of necessity be passed by as unimportant, that the court could act only after so many contempts had been committed that the courts and the government would have been undermined, by which time there would have been so great a popular uprising as to change the form of government, whereupon there would be no courts and therefore no contempt. Reductio ad absurdum.

Respondents have cited and laid much stress upon the case entitled State v. American-News Co., 64 S. Dak. 385, 266 N. W. 827. This decision is not in harmony with the prevailing and practically unanimous rule. In one article published shortly before sentence was to be pronounced against a defendant who had pleaded guilty the court was

told how to mitigate the sentence; it was told that any citizen "falling for" the salesmanship of the defendant's attorney might "live to fill the air with their vain regrets"; it was told that the defendants in other pending fraud cases should learn that "the public is to be no longer fooled," etc. How can this language be construed otherwise than [fol. 208] as a threat against the judge and against his future in public life? But the court said that although the article "took occasion to some extent to advise and inform the judge as to his duties" it nevertheless did not constitute a contempt. The making of such a statement publicly would be held in contempt in almost any other jurisdiction. Another article purporting to be an account of the proceedings when sentence was pronounced was also held not to be contemptuous because there was nothing more to be done by the court after sentence, although the article "was not a fair and impartial report of the proceedings, but was incomplete and misleading," it berated and ridiculed the judge, "was inaccurate and unfair," "passed definitely beyond the bounds of fair and decent comment and criticism," "without justification imputed incompetence and bad motives" to the judge. As to other articles which the defendants pleaded were published after having been advised by competent and reputable counsel that they did not constitute contempt, the court held that the articles were not contemptuous but at the same time declared that if the defendants had consulted an attorney they could not have retained an honest belief in the propriety of the articles, and that if any member of the bar had advised or counseled the publication he did so "in utter disregard of the ethics of his profession and in flagrant violation of his oath as an attorney." It has not been possible for me to reconcile the act of the court in giving complete absolution to the defendants by reason of the court's conclusion that the articles were not contemptuous with its upbraiding of the attorney and its reprobation of his advice to the same effect. Throughout the opinion in the American-News Company case the court [fol 209] treated the matter solely as a controversy between the court and the newspaper. Not once was consideration given to the importance to the defendant of having a fair hearing in an atmosphere uncorrupted by threats or criticism from extra-mural sources, or to the like importance to the public of feeling that its courts could be protected from such assaults.

It is frequently said that "the battles for a free press are a part of the march of democracy" and again that "as the people became enfranchised the press has been made free." Unaided the newspapers could not have preserved their freedom. The constitutional guaranty of freedom of speech and of publication would now be but a vacuous phrase if the courts had supinely permitted the enforcement of attempted legislative and executive restrictions. The courts have stood fast against all attempts to curtail personal rights and liberties, in many instances in the face of bitter and vituperative criticism and abuse not only from other officials but from the newspapers that must find protection for themselves in unbiased and untrammeled judges. If the courts are not permitted to try cases and render judgments impartially and without pressure either from newspapers, individuals, or groups of individuals, freedom of speech and freedom of publication will soon pass into oblivion. If a newspaper may suggest how a case should be determined, any person or group has the same right to suggest its ideas to the judge. Lawsuits would then be decided, not according to the weight of the evidence, but according to the weight of the influence brought to bear upon the judge, and the newspaper itself would be the victim if it had less influence than the opposing group. Chief Justice Hughes, who has been the author of many opinions sustain-[fol. 210] ing civil liberties, after making reference to the argument that the liberty of the press might be rendered a mockery and a delusion if public authorities were permitted to punish for harmless publications, said: "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public. * * * There is also the conceded authority of courts to punish for contempts when publications directly tend to prevent the proper discharge of judicial functions." (Near v. Minnesota, supra.)

It is the right of the government to protect itself from destruction. It is no less the right and the duty of the courts to protect the judicial branch of the government from influences that render it impotent, for without the courts democracy would not survive.

While there are further judicial acts to be performed the action is pending. The court is not prepared to say that a mere technical pendency of an action would bar criticism of or comment upon an order made by the court. But if the

action is still pending to the extent that other and further orders of the court may be required before the final determination of the action, the doing of which may be embarrassed or influenced, then the comment or criticism would be deemed to impede or obstruct justice and would be contemptuous. In a civil case the verdict of the jury or the rendition of a judgment by the judge does not terminate the case. A motion for new trial and other motions provided by law may be made and if made must be ruled upon by the judge. In a criminal case, in the event of a verdict of conviction, the defendant may make a motion for new trial and if denied he may make application for probation. A case [fol. 211] is pending until all such matters are decided by the court. If a motion for new trial should be granted the case would still pend awaiting a second trial.

Pendency of an action has been held to go even further. A case has been held to be pending on appeal after the filing of the decision and until the expiration of the period allowed for filing a petition for rehearing. (In re Nelson, 103 Mont. 43, 60 Pac. (2d) 365.) If such petition is filed, the action is pending until the denial of the same by the court, (McDougall v. Sheridan, 23 Idaho 191, 128 Pac. 954) or until final judgment is rendered and until remittitur is issued. (State v. Tugwell, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717.) A case is pending while it is still open to modification, rehearing, or appeal. (In re Chadwick, 109 Mich. 588, 67 N. W. 1071.)

It now becomes necessary to examine each editorial for the purpose of determining whether it so transgresses the principles laid down in the cited cases as to require the respondents to be placed on trial. Each of the cases upon which the editorials commented was pending in the Superior Court in and for Los Angeles County at the time of the publication of the editorial relating thereto.

Count 1 of the first proceeding relates to an editorial entitled "Sit-Strikers Convicted." It is alleged that the trial of the case of People v. William Busick, et al. had resulted in a verdict of guilty on December 20, 1937, and that the judge who presided at the trial fixed December 22d as the date for pronouncing sentence upon the defendants. The editorial was published on December 21st, the day intermediate the verdict and the date set for sentence. The editorial, among other things, said: "The verdict means

[fol. 212] that Los Angeles is still Los Angeles, that the city is aroused to the danger of davebeckism, and that no kind of union terroism will be permitted here. * * * If Beck can be convinced that this kind of warfare is not permitted in this area he will necessarily abandon his dreams of conquest. * * * For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime. * * * Government may have broken down in other localities; whole states may have yielded to anarchy. But Los Angeles County stands firm; it has officers who can do their duty and courts and juries which can function. So long as that is the case, davebeckism cannot and will not get control here; nor johnlewisism either."

The defendants in the criminal action were entitled, after the verdict to make a motion for a new trial and, if made, it was incumbent upon the trial judge to grant or deny it. If granted, the action would still be pending and if tried a second time prospective jurors no doubt would have been influenced by the editorial. If the motion were denied the defendants could apply for probation and the trial judge would then be called upon to grant probation or to impose sentence. It is alleged that the defendants were charged with conspiracy to violate Section 418 of the Penal Code, which declares that a person using force or violence in entering upon or detaining lands of another is guilty of a misdemeanor, and also to violate Section 594 of the Penal Code, which provides that every person maliciously injuring or destroying real or personal property not his own is guilty of a misdemeanor. The substantive offenses referred to in these sections of the Penal Code are misdemeanors, but the affidavit in this proceeding alleges that the defend- [fol. 213] ants were charged with a felony, to wit: conspiracy to violate the said sections. Whether conspiracy to commit a misdemeanor is a misdemeanor or a felony is contingent upon the sentence pronounced by the trial judge. (Penal Code, sec. 182.) After the publication of the editorial, these duties rested upon the trial judge: (1) to rule upon a motion for new trial, if made, and in so doing to determine whether error had been committed during the trial and also whether, in his judgment, there was sufficient evidence to warrant a verdict of guilty, and if not, to set aside the verdict; (2) if the motion for new trial should be

denied, then to act upon an application for probation, if filed; (3) if probation should be denied, then to determine by his sentence whether or not the defendants should be made felons or should suffer a minor penalty.

Considered according to the principles of the cases cited, the editorial was calculated and would have a reasonable tendency to influence the judge in his determination of these matters. It praised the verdict, warned that the defendants and their associates were not wanted in Los Angeles and would not be here as long as the courts were functioning. The language of the editorial as a whole was a suggestion to the court that no leniency be shown to the defendants. What would be expected, after reading the article, except condemnation of the judge if he deemed it legally necessary to grant a new trial or if he granted probation?

Count 2 sets forth an editorial entitled "The Wright Verdict". It is alleged that in the case of People v. Paul A. Wright the defendant was charged in two counts with murder, a felony; that he pleaded not guilty and not guilty by reason of insanity to both counts; that on February 12, 1938, the defendant was found guilty of manslaughter on [fol. 214] each count and on the same day the trial judge set February 14th as the date for trying the issues raised by the plea of not guilty by reason of insanity; that on February 13th the editorial in question was published. After stating that there would be little public disposition to criticize the verdict, even though it might be difficult to reconcile it with the evidence, the editorial made reference to Wright's evidence "with which he smeared the memories of his dead wife and his dead friend", referred to the "unwritten law" as "a form of social anarchy", and continued: "It is, of course, conceivable that the sight, if he saw it, may have so upset him mentally as to make his subsequent act less than outright murder. * * * Unfortunately for the public, this verdict does not end the nauseating case. Aside from appeal, Wright has another chance to escape the consequences of his act under the weird California law which enables him to say to the State: 'I didn't do it, but if I did I was crazy at the time and so ought not to be punished anyway.' Such is the effect of the contradictory but perfectly legal plea of not guilty and not guilty by reason of insanity. There is at least some consolation in the fact that the worst is over. Twice-dished dirt has little public interest."

After the publication of this editorial the trial on the plea of not guilty by reason of insanity was to be held. If the defendant had been found sane the usual motion for new trial no doubt would have been made, and if insane, then the procedure provided by law would have followed. The case was pending and undetermined on the date of the publication.

The editorial admitted the legality of the plea of not guilty by reason of insanity and criticized the law which permits the plea, a criticism which the court takes judicial [fol. 215] notice is shared by many citizens, lawyers and laymen alike. The writer did not criticize the jury, the court, or the verdict. There was no suggestion as to what subsequent action should be taken by the jury or by the court and no attempt to influence the jury or the judge. The reference to the "unwritten law" was of no consequence as the jury had already made its finding upon every defense except that of insanity. When there is a reasonable doubt as to whether a person has been guilty of contempt of court he should be given the benefit of the doubt. Nevertheless all comment would better have been postponed until after final disposition had been made of the case.

In Count 3 the editorial referred to is entitled "The Fall of an Ex-Queen". This editorial referred to the action entitled People v. Erwin P. Werner and Helen M. Werner, in which it is alleged that the two defendants were charged with attempted grand theft and violating Section 653f of the Penal Code, which provides that every person soliciting another to offer or accept or join in the offer or acceptance of a bribe, or to commit other named offenses, is punishable by imprisonment in the county jail for not longer than one year or in the state prison for not longer than five years or by a fine of not more than $5,000. A verdict of guilty on both counts was returned by the jury on April 12, 1938. On the same day each of the defendants gave notice of motion for a new trial and the judge fixed April 22d as the date for passing upon the said motions. On April 14th the editorial in question appeared in the Los Angeles Times in which reference was made to "boss-ship" in politics as "a denial of public rights" and that it "necessarily implies [fol. 216] a kind of moral obliquity if not an actually illegal one". The past political activities of the defendant, Mrs. Helen Werner, are mentioned and the editorial then stated

that "She would have been miscast in any other sphere of activity", and that in later life "She found her grip slipping and it was hard to take". It continued: "The several cases which in recent years have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her onetime influence in high places. That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical. But if there is logic in it, the money meant less to Mrs. Werner than the name of still being a political power, one who could do things with public officials that others could not do. To herself at least she was still Queen Helen."

Here again, as in the case of the "Sit-Strikers", the verdict of the jury did not end the case, as there were yet several matters to be passed upon by the judge. A motion for new trial had been made before the editorial was published and the time for hearing the same was set for a subsequent date. If the motion had been denied, the defendants had a right to make application for probation upon which the court was required to rule, and if probation were denied, the court by its sentence of the defendants to the state prison or to the county jail would determine whether they were felons or misdemeanants.

It does not appear from the affidavit in these proceedings that either the past political activities of Mrs. Werner to which the editorial referred or the cases which had "brought her before the court to defend her activities" [fol. 217] were involved in the then pending criminal case. Discussion at such time of extraneous matters of that character is, in my opinion, within the category of prohibited comment.

It is alleged in Count 4 that on April 11, 1938, an action entitled John L. "Jackie" Coogan v. Arthur L. Bernstein, et al. was commenced in which the plaintiff sought to recover from his mother and his stepfather an accounting of money alleged to have been earned by the plaintiff as a motion picture actor while a minor, and that upon the commencement of the action an order appointing a receiver and a restraining order were issued and served upon the defendants; that on April 16th an editorial was published entitled "Jackie's Millions", which referred to the Cali-

fornia statute under which a child's earnings belong to its parents, and stated that when the statute was passed it could not have been foreseen that a minor could earn large sums of money, and that the fact that he should have "no right to a penny of these earnings and no more voice in their disposal than a trained dog seems almost as fantastic as the earnings themselves". Reference is made to the life of a juvenile film prodigy as not being an enviable one, cast in an unnatural and artificial setting, devoid of many of the natural pleasures and companionships of childhood, and closes as follows: "That they should be allowed some compensation for these sacrifices for use when their few years of fleeting fame are over seems only fair. At least it will seem so to the millions to whom the wistful waif who was Jackie Coogan in 'The Kid' gave pleasure".

It does not seem possible that this editorial could influence the mind of any judge who should hear the case. It does not indicate how the writer of the editorial thought the case should be decided, and does not attempt to influence [fol. 218] or sway the court in the slightest degree. It is merely a statement of the law as set forth in Section 197 of the Civil Code and an expression of sympathy for minors who have earned large sums of money at a sacrifice of the joys of childhood and who have none of their earnings when they reach majority. All that the court may do in this action is to apply the law as written and as affected by evidence that may be introduced at the trial, if any, tending to show that the parents had in some manner waived the provisions of the statute or had made or agreed to make a gift of the minor's earnings to him, or had in some manner established a right in his favor which was not created by the law. The editorial does not go farther than to express an earnest wish that the statute might be different.

Count 5 sets up an editorial entitled "Probation for Gorillas?", relating to an action entitled People v. Matthew Shannon and Kennon Holmes, who, it is alleged, were charged with two counts, conspiracy to commit an assault with a deadly weapon, and the assault itself. A verdict of guilty was rendered on April 22, 1938. The defendants made application for probation and on May 2d the trial judge set June 7th as the date for passing upon the application for probation and for the pronouncement of sentence.

On May 5th the editorial appeared in the Los Angeles Times, reading as follows:

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders', or plead that they were merely indulging in playful exuberance when, with slingshots, they [fol. 219] fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

The editorial throughout is a vigorous argument against the granting of probation to the defendants, setting up in the strongest language a statement of the offense with which they were charged, refers to them as "sluggers for pay" and as "a deliberate foe of organized society", states that "it will teach no lesson to other thugs to put these men on good behavior for a limited time", and ends by stating that "Judge A. A. Scott will make a serious mistake if he grants probation" and that "this community needs the example of their assignment to the jute mill".

[fol. 220] Assault with a deadly weapon is punishable by imprisonment in the state prison or in the county jail, and whether it is a felony or a misdemeanor depends upon the

sentence pronounced by the court (Penal Code, sec. 245.) Likewise, conspiracy to commit a misdemeanor may be made a felony or a misdemeanor by the court according to the sentence. (Penal Code, sec. 182.)

In the Shannon and Holmes case there was actually pending before the court, on the date of publication, an application for probation. The editorial writer in forceful terms announced his opinion to the judge, mentioning him by name, that probation should be denied. By the suggestion "of their assignment to the jute mill" the judge was advised so to exercise his discretion as to make felons of the defendants.

It is of no consequence that this editorial, as argued by counsel for respondents, merely expressed the attitude which the Los Angeles Times had maintained for more than fifty years toward those who committed violence during labor disputes. Even if such attitude had been well known in this community for the period mentioned that fact did not excuse the language addressed directly to the judge telling him in few but expressive words how he should deal with the convicted defendants.

The affidavit by which the first proceeding (No. 428920) was instituted was filed June 3, 1938, and the order to show cause why the respondents should not be adjudged guilty of contempt as charged in the affidavit was issued on the same day. The affidavit in the second proceeding (No. 429179) alleges that on June 5th and 7th, respectively, editorials appeared in the Los Angeles Times commenting upon the first proceeding in such manner as to constitute contempt of court.

[fol. 221] In Count 1 it is alleged that on June 5, 1938, an editorial entitled "A Black Committee Here?" was published. Because of its length only short excerpts will be given. Generally it is a criticism of the committee for having commenced the first proceeding. Their act is referred to as "an effort to set up a sort of a local Black committee of press censorship". It then says: "In order that the public may be informed as to this extraordinary attack upon the right of free speech and a free press, these instances may be briefly described here".

The editorial, after giving the respondents' explanation of each of the articles complained of in the first proceeding, sets forth an argument in favor of the right of the newspaper, under the guaranty of freedom of the press, to

comment as it did upon the five cases which were the subject of the previous editorials, and discusses the merits of the first proceeding. It is an argument that might well be used upon the trial but not previously in such manner as to prejudice the public or to embarrass the court.

In the cases of In re Lindsley, supra, and Lindsley v. Superior Court, supra, the contempt consisted of attacks upon the prosecutor and the witnesses, not upon the court. There the attacks were vitriolic and vituperative while here they cannot be so classed, but they have no place in the public prints during the pendency of the proceeding. The members of the Committee of the Bar Association are officers of the court and are performing the same duty for the court and for the people as the district attorney performs in the prosecution of a criminal case. Any intimidation of or interference with an officer of the court while in the performance of his duties is a contempt of court.

[fol. 222] It is alleged in Count 2 of the second proceeding that on June 7, 1938, another editorial entitled "Curious Reasoning" was published likewise relating to the first proceeding. This editorial, like the last, consists of a statement of the facts from the standpoint of the respondents and an argument upon the law relating to their previous citation for contempt. It will serve no purpose to quote from it here.

By means of both of the editorials complained of in the second proceeding the respondents have placed before the public and the judges of this court their version of the facts and their argument as to the law, while the attorneys for the Bar Association were bound by the ethics of their profession to remain silent until the case was brought on for argument in open court.

By the decisions hereinbefore cited it is clearly settled that the question of contempt does not depend upon whether the judge in the case is a weak judge, or whether he is extraordinarily strongminded and has sufficient fortitude to withstand all threats and intimidation, or whether he is an average judge. Neither does it depend upon whether the judge is one who has an ear to the ground listening to political rumblings or an eye upon the weather vane to ascertain the direction of the popular wind, or whether he is one who knows no politics, hears no public clamor, but administers justice with an even hand. The judge need not

have been influenced, the speech need not even have been heard nor the article read by him. The question is whether the speech or the publication has a reasonable tendency to influence the judge, or is calculated to interfere with a fair trial and a righteous judgment, or tends to bring the court into disrepute with the public.

[fol. 223] An article constitutes a contempt if it tends to create in the public mind distrust and suspicion of the court, or if it places the judge in such a position that he will never know whether he was unconsciously biased by the publication, or the public will never know whether he was influenced in the direction pointed by the article, or because of his combative nature he was swayed in the opposite direction. (In re San Francisco Chronicle, supra.)

In No. 428920 the demurrer is sustained without leave to amend as to Counts 2 and 4, and is overruled as to Counts 1, 3, and 5. In No. 429179 the demurrer is overruled as to both counts. In each case the respondents may answer within five days, counsel having indicated this to be sufficient time. The contempt proceedings are set for trial on Thursday, August 25, 1938, at 10 A. M., in Department 34 of this court.

Dated the 18th day of August, 1938.

Emmet H. Wilson, Judge."

8. The foregoing stipulations, records, files and proceedings, and all matters therein referred to, constitute, for the purposes of the above entitled proceedings, a complete and correct record of the proceedings had and taken in the court whose orders are herein under review, and the review of said matters may be taken, heard and determined upon said record.

Dated: November 16, 1938.

The Times-Mirror Company, a corporation, Harry Chandler and L. D. Hotchkiss. By Cosgrove & O'Neil. By T. B. Cosgrove. By F. B. Yoakum, Jr. [fols. 224-225] The Superior Court of the State of California, in and for the County of Los Angeles. By J. H. O'Connor, County Counsel. By Douglas De Coster, Chief Deputy County Counsel. By Allen W. Ashburn. By Michael G. Luddy. By Isaac Pacht. By Arnold Praeger.

[fol. 225a] IN SUPREME COURT OF CALIFORNIA

L. A. 16928-16929—The Times-Mirror Co. v. Superior Court

MINUTE ENTRY OF ARGUMENT

Matters called for hearing on review and argued by T. B. Cosgrove on behalf of petitioners and by S. V. O. Prichard, assistant county council, Los Angeles County, and Allan W. Ashburn, on behalf of respondent.

At 12 noon court recessed until 2 P. M. Court reconvened at 2 o'clock P. M., with the same justices and attaches present as at forenoon session.

Mr. Ashburn resumed argument and requested thirty days for supplemental brief, which was granted and petitioner given twenty days to reply. Mr. Cosgrove argued further in behalf of petitioners. At the conclusion of Mr. Cosgrove's argument, Mr. A. L. Wirin, as amicus curiae, representing the American Civil Liberties Union, requested and was allowed ten minutes for argument. Matters noted ready for submission.

December 7, 1938.

[fol. 226] IN SUPREME COURT OF CALIFORNIA

L. A. 16928-16929—The Times-Mirror Co. v. Superior Court

ORDER OF SUBMISSION

Chief Justice Waste announced that because Justice Houser deems himself disqualified in these cases, Justice Pullen will sit and act in his stead. Matter argued by T. B. Cosgrove with whom F. B. Yoakum appeared on behalf of petitioner, followed, under court's permission, by A. L. Wirin, as amicus curiae in support of petitioner's position. A. W. Ashburn and Isaac Pacht replied on behalf of respondent. Mr. Cosgrove received permission to file a further brief bearing upon recent Bridges decision, and Mr. Ashburn reserved right to reply within ten days if desired. Matters submitted.

November 2, 1939.

[fol. 227] IN SUPREME COURT OF CALIFORNIA

In Bank

L. A. 16928

THE TIMES-MIRROR COMPANY, a Corporation, and L. D. HOTCHKISS, Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent

L. A. 16929

THE TIMES-MIRROR COMPANY, a Corporation, and L. D. HOTCHKISS, Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent

OPINION—Jan. 31, 1940

These two proceedings were on the December 1938 calendar of this court, sitting in bank, with five regular justices and one justice pro tempore present. The cases were then argued by counsel for the respective parties and by one of the amici curiae. Thereafter and before any decision of either of said causes had been agreed upon, one of said justices died, and another of said justices declared his disqualification to participate in any decision that might be rendered in either of said causes. In this situation, this court found that it was unable to procure the concurrence of the constitutional number of qualified justices, who had heard the argument, in a decision of either of said causes, and basing its order upon that ground, directed that said causes be placed upon a subsequent calendar for argument. [fol. 228] This argument has been held, and the same counsel who argued these cases at their first hearing before this court were present and participated in the second argument before us.

The two proceedings present the same legal issues and substantially the same factual situation is present in each case, except as to the contents of the editorials which were the basis of the contempt charges filed against petitioners.

The petitioners were adjudged guilty of contempt of court for the publication of certain editorials in the Los Angeles Times, a newspaper of general circulation published in the city of Los Angeles, and these proceedings were instituted to review the two orders of court adjudging them guilty of contempt. Each of the contempt proceedings was instituted by an affidavit presented to the Superior Court of the County of Los Angeles by J. Louis Elkins, Secretary of the Los Angeles Bar Association, pursuant to the provisions of Section 1211 of the Code of Civil Procedure, and was prosecuted by attorneys from said bar association under the provisions of Part III, Title V of the Code of Civil Procedure, entitled, "Contempts."

Petitioners contend that these proceedings are "criminal actions" and should be instituted in the name of the people of the state of California and prosecuted like any other criminal action by the district attorney of the county in which the offense was committed, and that the accused were entitled to a jury trial and all other rights and privileges accorded to a defendant in a criminal action. Petitioners further claim that they are immune from punishment by virtue of that portion of subdivision 13 of section 1209 of the Code of Civil Procedure, reading as follows: "But no speech or publication reflecting upon or concerning any [fol. 229] court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

These issues were all before us in the case of Bridges v. Superior Court, recently decided by us and reported in 98 Cal. Dec. 341, and the same contentions were made by the petitioner in that case as are now made by the present petitioners. A reference to that decision will show that we held that none of said contentions was meritorious, and that we sustained the procedure followed in that case which is precisely like that pursued in these proceedings, and furthermore we held that the provisions of subdivision 13 of section 1209 of the Code of Civil Procedure, relied upon by the petitioner Bridges as well as by the petitioners in these proceedings were unconstitutional, and therefore afforded no protection for the publication of the article by the petitioner in that proceeding. It is apparent, therefore, that all the legal questions presented by these two petitions, and stated above, have been decided by us adversely

to the contentions of said petitioners. No useful purpose would be gained by reiterating what we said in this former opinion in the decision of these questions. It, therefore, only remains for us to apply the law as settled by our previous decision to the facts in the present proceedings.

The first of these two proceedings was brought to review the order of the trial court adjudging the petitioner, the Times-Mirror Company, publisher of the Los Angeles Times, and L. D. Hotchkiss, managing editor of the Los Angeles Times, guilty of contempt of court upon the charge [fol. 230] set forth in Count 1 of the affidavit of J. Louis Elkins, and to review said order of said court adjudging the petitioner, the Times-Mirror Company, guilty of contempt of court upon two additional charges of contempt contained in said affidavit, and set forth in Counts 3 and 5 respectively of said affidavit.

The second of said two proceedings was instituted to review the order of said court adjudging the petitioners, The Times-Mirror Company, the publisher of the Los Angeles Times, the president of the Times-Mirror Company, and its managing editor, guilty of contempt of court upon the two charges contained in said second affidavit of J. Louis Elkins, presented to said superior court.

In determining whether the publication of an editorial, or article, commenting upon a pending action, renders the author thereof guilty of contempt of court, the test to be applied to such a publication is whether it had a reasonable tendency to interfere with the orderly administration of justice in the action which was the subject of the comment and which was then before the court for its consideration, or decision. If the article had that effect, then its publication rendered the person responsible for its publication guilty of contempt of court. This question was before us in the Bridges case, where authorities supporting the statements just expressed, from this court, the Supreme Court of the United States, and other jurisdictions, are cited and may be found on page 357 of our opinion.

The first of the several editorials to which we will give consideration is that set forth in Count 1 of the accusatory affidavit presented to the court and sworn to by J. Louis Elkins. It is entitled, "Sit-Strikers Convicted," and referred to the case of People v. William Busick, and others, [fol. 231] in which action the jury had rendered a verdict finding certain of the defendants guilty of a conspiracy to

violate certain sections of the Penal Code. It was as follows:

"The verdict of a jury finding guilty the twenty-two sit-strikers who led the assault on the Douglas plant last February, will have reverberations up and down the Pacific Coast and in points farther east.

"The verdict means that Los Angeles is still Los Angeles, that the city is aroused to the danger of davebeckism, and that no kind of union terrorism will be permitted here.

"The verdict may have a good deal to do with sending Dave Beck back to Seattle. For, while the United Automobile Workers have no connection with Beck, their tactics and his are identical in motive; and if Beck can be convinced that this kind of warfare is not permitted in this area he will necessarily abandon his dreams of conquest.

"Already the united farmers and ranchers have given Beck a severe setback. The Hynes hay market is still free and it has been made plain that interference with milk deliveries to Los Angeles will not be tolerated.

"Dist-Atty. Fitts pledged his best efforts to prevent and punish union terrorism and racketeering in a strong radio address, and followed it up yesterday with a statement congratulating the jury that convicted the sit-downers and the community on one of the 'most far-reaching verdicts in the history of this country.'

"In this he is correct. It is an important verdict. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime.

[fol. 232] "The seizure of property by a militant minority which arrogated to itself the right of dictating not only to employers, but to other workers not in sympathy with it, what should be the terms and conditions of working, has proved to be within the control of local peace officers and authorities.

"Nobody ran off to Washington to get this affair handled. It was attended to right here.

"Government may have broken down in other localities; whole States may have yielded to anarchy. But Los Angeles county stands firm; it has officers who can do their duty and courts and juries which can function.

"So long as that is the case, davebeckism cannot and will not get control here; nor johnlewisism either."

The verdict finding said defendants guilty was rendered on December 20th, 1937, and the trial judge before whom the case was pending, fixed December 22, 1937, as the time for pronouncing judgment upon the defendants. On the 21st of December, 1937, the above mentioned editorial was published, which date, it will be seen, was one day after the verdict and one day before the time fixed by the court for pronouncing judgment. At the time fixed by the court, provided no motion for a new trial nor application for probation was made, it was the duty of the trial court to pronounce judgment against said defendants. By its verdict, the jury found the defendants guilty of a conspiracy to violate sections 418 and 594 of the Penal Code. While each of the crimes denounced in these sections respectively is made a misdemeanor, by section 182 of the Penal Code a conspiracy to commit a misdemeanor is punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand [fol. 233] dollars, or both. By section 19a of the Penal Code, it is provided that in no case shall any person sentenced to confinement in a county jail on conviction of a misdemeanor be committed for a period in excess of one year. Therefore in sentencing the defendants found guilty by the jury in the case of People v. William Busick, et al., it was within the power of the trial court to sentence them to the county jail for one year or less, or to the state penitentiary, where under the indeterminate sentence law they might be imprisoned for a term of two years, or they might be punished by a fine not exceeding five thousand dollars, or by both imprisonment and fine. The defendants in said action had the right to move for a new trial and also to make application for probation.

At the time of the publication of said editorial, it cannot be said that the proceedings in the case of People v. William Busick et al. had reached such a point of finality as to form a proper subject of comment. The defendants found guilty by the verdict of the jury were yet to be sentenced by the court. They had the right in said action, at the proper time in the future, to make a motion for a new trial and an application for probation. Even if they did not make either said motion or application, the case against them was still pending for the purpose of pronouncing judgment. As we

have shown, wide discretion was given the court in pronouncing judgment upon the verdict rendered by the jury. The judgment of the court, acting within the discretion with which the judge was by law clothed, might vary from a sentence to the state penitentiary for a possible term of two years, in which case the defendants would be guilty of a felony, or it might be a sentence of confinement in the county jail for a period as short as one day, or to pay a simple fine [fol. 234] as low as one dollar. It is obvious that the pronouncing of judgment in a case of this character where such wide discretion is given the trial judge, was a matter of grave concern to the parties to the action, and particularly to the defendants, and it was of the utmost importance to them that the trial judge in pronouncing judgment against them should act strictly in accordance with the record before him, and that his judgment should not be hampered nor swayed by any outside influence. These observations apply also to the motion for a new trial and the application for probation. While neither motion nor application had been made at the time of the publication of the editorial, the right of the defendants to pursue said remedies existed at said time and the case in which they might be exercised was pending at the same time.

Furthermore, a motion for a new trial and an application for probation in the event a new trial is denied is in accordance with the ordinary and usual practice followed in criminal cases and is sanctioned by the Penal Code. We can see no force in petitioners' argument that because the editorial was published after the verdict, but prior to the making of said motion or application, the proceedings in the case had reached such a point of finality as to form a proper subject of comment. It cannot be successfully contended that the verdict was decisive of the case or was a final determination of the fate of the defendants. Even if we disregard the convicted defendants' right to move for a new trial and their right to apply for probation, there still remained, when said editorial was published, the duty of the court to pronounce judgment against said defendants. The case was still pending for that purpose, and until judgment was pronounced, [fol. 235] any public comment which would have a reasonable tendency to influence the court in pronouncing sentence upon the defendants in said action would not be justified.

In respect to the judgment of the trial court finding both Hotchkiss, the managing editor, as well as the Times-Mir-

ror Company, guilty of contempt of court for the publication of the editorial contained in Count 1 and entitled "Sit-Strikers Convicted," it is contended that the accusatory affidavit fails to allege that L. D. Hotchkiss personally caused or permitted the publication of the editorial set forth in Count 1, and the case of Otis v. Superior Court, 148 Cal. 129, is cited in support of said contention. The allegations in the two affidavits are materially different. In the Otis case, the affidavit alleged that certain individuals were officers of the publishing company, but contained no allegation that they caused or permitted the publication of the offending articles. The affidavit accusing petitioners of being in contempt of court in the present proceeding expressly alleges not only that petitioner, L. D. Hotchkiss, was the managing editor of the Los Angeles Times but that he, together with the publisher and other officers, "caused to be printed and published the issue of the Los Angeles Times which contained the editorial entitled 'Sit-Strikers Convicted.'" It would be difficult to couch the affidavit in more direct terms.

We now pass to the consideration of the questions as to whether this editorial entitled, "Sit-Strikers Convicted," was of such a character as to render those responsible for its publication guilty of contempt of court. In our investigation of the various decisions of the several courts of this country, including those rendered by the Supreme Court [fol. 236] of the United States, respecting the character of publications which rendered their authors subject to disciplinary action by the courts in contempt proceedings, we are impressed with the statement found in an opinion rendered by Justice Holmes in the case of Patterson v. Colorado, 205 U. S. 454. After referring to the effect of the publication of matters pending in a jury case upon the members of a jury before whom the action is being tried, that learned justice further stated, "What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury and the publication may affect their judgment. Judges generally, perhaps, are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case

is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied."

This excerpt from the opinion of Justice Holmes was quoted with approval by this court in the two cases of In re Shuler, 210 Cal. 377, 403, and in the Bridges case. It may well be considered as a correct statement of the law in this state as the true test to be applied. This question was discussed in greater detail in the Bridges case where additional authorities are cited in support of the "reasonable tendency" rule.

In passing, we might here answer briefly the argument of petitioners that the proper test is not the reasonable ten- [fol. 237] dency of the publication to interfere with the administration of justice or obstruct or embarrass the court in the decision of the pending matters, but is the effect of the publication upon the particular judge before whom the case is pending, or in the words of petitioner, "there must of necessity be a uniform yardstick to measure off or determine the presence or absence of 'reasonable tendency to influence.' This criterion or yardstick, we believe, and accordingly contend, is the mentality, fortitude and integrity of the average judge." Petitioners cite no authority in support of their theory, and it has been expressly repudiated by a recent decision of the Supreme Court of the United States, (Sinclair v. U. S., 279 U. S. 749, 764) where that court held as follows: "In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the court to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

The editorial entitled, "Sit-Strikers Convicted" unquestionably approved the jury's verdict. It praises the jury for its rendition, and the court in which the action was pending. It discussed the importance of the verdict and its effect upon the industrial strife then being waged in and beyond the limits of the City of Los Angeles. Its reference to "union terrorism and racketeering" can only be con-

strued as implying that the convicted defendants in the pending action were engaged in such activities. These ex- [fol. 238] pressions of approval of the verdict and condemnation of the convicted defendants made by such an influential paper as the Los Angeles Times on the day just preceding the day fixed by the court for pronouncing sentence could not help having an effect upon the trial judge, who, as we have seen, was clothed with a wide discretion in fixing the punishment of the convicted defendants, to say nothing respecting his duties in case a motion for a new trial was made or an application for probation was presented to him. It cannot reasonably be said that they would have no tendency to influence the trial judge in rendering the judgment, or in ruling upon the other matters that in the regular order of the proceedings in criminal matters would come before him in the case then pending. The editorial may not have been intended, but it is capable of being construed, as a notice to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that should the court act contrary to the suggestions contained in the editorial, it might well expect adverse criticism in the columns of The Times. Viewing the editorial in the light of these considerations, we are satisfied that its reasonable tendency was to interfere with the ordinary administration of justice by the court in the action then pending before it.

The next publication, being the editorial set forth in Count 3 of said affidavit, was an editorial entitled, "The Fall of an Ex-Queen." It referred to Helen M. Werner, who on the 12th day of April, 1938, had been convicted by a jury on two counts, one charging her with an attempt to commit grand theft, and the other with a violation of section 653f of the Penal Code, respectively. On the same day, she gave notice of motion for a new trial, and the judge before [fol. 239] whom the case was pending on the same day fixed April 22, 1938, as the time for hearing said motion and pronouncing judgment. On the 14th day of April, 1938, the alleged contumacious editorial was published.

Practically the same discretion as was given the trial judge in pronouncing judgment in the case against the so-called "Sit-Strikers" was given him in the case against Helen M. Werner. The facts of the case are in principle similar, except that in the Werner case the defendant had actually made a motion for a new trial and said motion was

pending at the time of the publication of the editorial in question.

The editorial was as follows: "Politics as we know it is an essentially selfish business, conducted in the main for personal profit of one kind or another. When it is of the boss type, it is apt to be pretty sordid as well. Success in bossship, which is a denial of public rights, necessarily implies a kind of moral obliquity if not an actually illegal one.

"So that it is something of a contradiction of sense if not of terms to express regret that the political talents of Mrs. Helen Werner were not directed to other objectives than those which, in the twilight of her active life, have brought her and her husband to disgrace. If they had been, she would not have been in politics at all and probably would never have been heard of in a public way. Her natural flair was purely political; she would have been miscast in any other sphere of activity.

"Mrs. Werner's primary mistake seems to have been in failing to recognize that her political day was past. For years she enjoyed the unique distinction of being the country's only woman boss—and did she enjoy it! In her heyday she had a finger in every political pie and many were [fol. 240] the plums she was able to extract therefrom for those who played ball with her. From small beginnings she utilized every opportunity to extend her influence and to put office holders and promising political material under obligations to her. She became a power in the backstage councils of city and county affairs and from that place of strategic advantage reached out to pull the strings on State and legislative offices as well.

"Those were the days when Mrs. Werner was 'Queen Helen' and it is only fair to say that to her the power was much more important than the perquisites. When the inevitable turning of the political wheel brought new figures to the front and new bosses to the back, she found her grip slipping and it was hard to take. The several cases which in recent years have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her onetime influence in high places. That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical. But if there is logic in it, the money meant less to Mrs. Werner than the name of still being a political power, one who could do things

with public officials that others could not do. To herself at least she was still Queen Helen."

While the editorial does not refer to the case which was then pending against Helen M. Werner, it is hardly conceivable that those in charge of its publication were ignorant of the pendency of said action. Both Helen M. Werner and her husband had been active and prominent in politics both in the city and in the county of Los Angeles. In fact the editorial so states in so far as the activities of Helen M. Werner were concerned, and further suggests that she [fol. 241] "reached out to pull the strings on state and legislative offices as well." With a person of such local prominence, charged with serious offenses, on trial, it must be assumed that the petitioners were cognizant of the action then pending against her, and that it had reached the stage which would require either the pronouncement of judgment, or the granting of a new trial. With this knowledge before them, they prepared and published the editorial which it must be conceded was a scathing denunciation of Mrs. Werner and a caustic criticism of her political activities in recent years. That a publication of this character concerning a person convicted by the verdict of a jury, and who was soon to appear for sentence, would have a disturbing effect upon the judge before whom the case was pending when the time came for pronouncing judgment, we think can neither be questioned nor denied. Such a publication according to the authorities hereinbefore cited comes within those prohibited acts, the commission of which renders those responsible therefor liable to the punitive powers of the court.

The editorial contained in Count 5 of said accusatory affidavit is entitled, "Probation for Gorillas?". It was published after two defendants, Shannon and Holmes, had been found guilty by a jury of conspiracy to violate section 245 of the Penal Code (assault with a deadly weapon) and assault with a deadly weapon. They made application for probation, and on the 2d day of May, 1938, the judge who presided at the trial set June 7, 1938, as the time for passing upon their application for probation. On May 5, 1938, the editorial entitled as above was published, and is as follows:

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck

[fol. 242] drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

But little is said, or can be said, in defense of the publication of this editorial. Among other things, it calls by name the judge before whom the action was pending, and directly charges that the judge will make a serious mistake if he grants probation to the two convicted defendants. The edi- [fol. 243] torial as a whole is a striking example of a "premature statement, argument, and intimidation" respecting the case on trial which the court condemned and held to be contumacious in the case of Patterson v. Colorado, supra.

While petitioner, The Times-Mirror Company, advances no serious defense of its publication of said editorial in so far as the character and nature of the editorial are involved, it does insist that as the matter then before the court was the question of probation the petitioner was privileged to make whatever comment it was thought advisable under all the circumstances of the case. In other words, petitioner contends that a different rule applies to statements made and articles published respecting a case, or the parties

thereto, when the sole matter before the court relates to the probation of a defendant than when the court has under consideration the guilt of the defendant or other strictly legal question arising during the trial of a defendant in a criminal action. When the sole matter before the court relates to the probation of a defendant petitioner contends that any person is free to communicate with the court or to express his opinion publicly through the press, or otherwise, respecting the propriety or advisability of the court's granting or denying probation to the applicant. We find ourselves unable to agree with this contention. Section 1203 of the Penal Code prescribes the procedure governing applications for probation and the source from which the court may receive the necessary information to enable it to act in such matters. By this section of the code the court must refer the application to the probation officer whose duty it is after investigation to make a report to the court which report the court must consider in making its final decision in granting or denying probation. We find nothing in said [fol. 244] section of the code nor in any other provision of the law which would justify any different approach to the court when matters of probation are before it than when the regular proceedings before and at the trial are under the court's consideration. Mr. Chandler in an affidavit filed with the trial court at the hearing of the contempt proceedings against petitioners stated, "In one recent probation case, The Times was advised by a former presiding superior judge that a criticism of probation published subsequent to the granting should have been made known while the matter was pending instead of afterwards." If this advice could be construed as permitting the publication of an editorial like that entitled, "Probation for Gorillas?" then the same right should be accorded to those newspapers favoring the probation of these same defendants referred to in the editorial. We would then have the deplorable sit ation of a heated newspaper controversy being carried on in the community while the question of probation was before the court for determination. That such a situation would contribute to the orderly administration of justice, we think no one would contend. We do not mean to hold that a person interested for or against the probation of a defendant may not make known his views as to the propriety of granting or denying probation to the probation officer, so that this officer may investigate the source or grounds of these views

and report the result of his investigation to the trial judge. But to approach the judge either directly or indirectly, through the columns of a newspaper, or otherwise, in our opinion is not permissible. The probation of a defendant is a legal act of the court and is governed by the same rules as are applicable to any other legal proceeding before the court.

[fol. 245] Possibly by reason of the title of the editorial, and the calling of the trial judge by name, followed by the statement that he would make a mistake if he should grant probation to the defendants, petitioner has considered this editorial as referring only to the application of defendants for probation. But the application for probation was not the only matter in that action that was then pending before the court. Judgment had not yet been pronounced in said action. The same wide discretion was given to the trial judge in sentencing the defendants in the criminal action commented on in this editorial as was given the trial judge in the actions commented on respectively in the two previous editorials. Therefore, what we have said respecting the effect of each of the two preceding editorials, is applicable to the publication of the editorial entitled, "Probation for Gorillas?". It referred to an action which was then pending in court, and the statements contained therein were calculated to and had a reasonable tendency to influence the proceedings in said action, and to interfere with the proper administration of justice by the court in which said action was pending.

In Mr. Chandler's affidavit he sets forth at some length the history of the industrial strife that has been waged in Los Angeles and in other parts of the United States during the past years. In this affidavit, he states, "For approximately fifty years, the Los Angeles Times has been the principal newspaper exponent in the United States of the open shop system of industrial relations." It is further shown in said affidavit that the position of the Los Angeles Times respecting the industrial controversy was well known in the City of Los Angeles and elsewhere throughout the state. The affidavit then goes into some considerable detail [fol. 246] as to the part taken by the Los Angeles Times in condemning the "sit-down strikes," and the strike of the Teamsters' Union to which the two convicted defendants mentioned in the "Probation for Gorillas?" editorial

belonged. It was stipulated that the allegations contained in said affidavit were true.

From the facts set forth in said affidavit it is contended that the position of the Los Angeles Times was so well known in the City of Los Angeles both by the citizens generally and the officials of said city and the county of Los Angeles, including the members of the judiciary of said county, that the superior judges before whom the two actions were pending would not be influenced nor would either of the defendants in either of said actions be prejudiced to any extent by the publication of the respective editorials which particularly referred to the action in which they were convicted. The weight to be given to this evidence was solely a matter resting with the trial court. In these proceedings for the review of the judgments of the trial court finding the petitioners guilty of contempt, the sole question before us is one of jurisdiction of the trial court to render the judgment under review, and in such a case the review of the evidence is limited to determining whether there was any substantial evidence to sustain the jurisdiction of the trial court. (McFarland v. Superior Court, 194 Cal. 407; Bridges v. Superior Court, 98 Cal. Dec. 341, 354, and authorities therein cited.) The affidavit of Mr. Chandler did no more than cause a conflict in the evidence which the trial court resolved against petitioner.

It is earnestly and seriously contended by petitioners that the order adjudging petitioner guilty of contempt of [fol. 247] court violates the right of freedom of speech and of the press guaranteed by the state and federal constitutions. What we said in the Bridges case respecting the right of free speech applies with equal force to the claim of petitioners herein that they are protected in the publication of said editorial by the constitutional guaranty of freedom of the press. There is no fundamental difference between these two constitutional privileges. The right of free speech and the freedom of the press are guaranteed by the same section of both the federal and state constitutions. In In re Shuler, 210 Cal. 377, 402, we held that, "No difference can be discerned between the rights of the citizen and the proper limitation thereof under his aforesaid constitutional guaranty, whether that citizen be a minister speaking from his pulpit, or a broadcaster through the radio, or an editor through his newspaper, or a curbstone orator * * * or an anarchist * * * the right and the limitation thereof

being the same when the matter involved in the utterances of all or any of these affects or manifestly tends to affect the orderly administration of justice in pending causes before judicial tribunals and the judges thereof." And in In re Shortridge, 99 Cal. 526, 535, we find this concise language, "As stated before, what may be spoken may be written, and the converse of the proposition is true that what may not be spoken under such circumstances may not be written."

The constitutional right of freedom of the press and the limitations thereon have been the subject of innumerable decisions of the state and federal courts. We shall cite only a very few of these decisions, and briefly quote from them.

In the case of Toledo Newspaper Co. v. United States, 247 U. S. 402, there existed a bitter controversy between the [fol. 248] City of Toledo and a street railway operated in said city. This controversy led to an action between these parties in which the creditors of the railway company intervened. While this action was pending, a local newspaper, published by the Toledo Newspaper Company, began the publication of articles adverse to the rights asserted against the city by the creditors and the railway company. The publisher and editor of the newspaper were found guilty of contempt of court by reason of the publication of said articles. The matter came before the Supreme Court of the United States and among other contentions was the contention that the publications related to a matter of public concern and were safeguarded from being made the basis of contempt proceedings by "the assuredly secured freedom of the press." In answering this contention the court on page 419 of the opinion said: "We might well pass the proposition by because to state it is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed

in human society, is subject to the restraints which separate right from wrong-doing."

[fol. 249] In State v. Lovell, 117 Neb. 710, 717, the supreme court of that state has expressed similar views in the following language: "The freedom of the press vouchsafed by the Constitution implies the publisher's respect for the equal rights of others. One of those rights that the publisher is bound to respect is a litigant's privilege of appearing before an independent, impartial court for judicial redress, uninfluenced or embarrassed by contemptuous publications pending litigation. Under the Constitution this right is as sacred as the freedom of the press. By both state and federal Constitutions government is composed of distinct legislative, executive and judicial departments of equal rank. The judiciary is an independent tribunal to which the individual may resort whenever his property rights are invaded by private wrongdoers, by public agencies or by the legislative or executive departments. In controversies over rights guaranteed by the Constitution the individual stands before the court on an equality with government itself. The constitutional provision creating an independent judiciary is recognized by historians, philosophers and statesmen as a vast contribution to the science of government. To preserve the purity, impartiality and independence of the court is a solemn duty that cannot be evaded without endangering all constitutional rights, including the freedom of the press." The same court in the case of State v. Bee Publishing Company, 60 Neb. 282, 296, expressed itself as follows: "Courts are charged with the function of administering justice, and it is their duty not only to give to every suitor his demandable right, but to give him assurance that no banned and hostile influence shall operate against him while his cause is under [fol. 250] consideration. A litigant is entitled not only to a just decision, but to a decision altogether free from the suspicion of having been coerced. Nothing else will satisfy him; nothing less can fill the measure of his expectations. He has no standard with which to gauge judicial firmness; and if the court has been exposed to influences calculated, as in the Kennedy case, to tell against him, he will not know whether an adverse decision is the voice of the law or an echo of the mob."

In Tate v. State, 132 Tenn. 131, the supreme court of Tennessee, at page 139 of its decision states the rule in the

following terms: "The liberty of the press is not a more sacred right than the right to a fair and impartial trial, which the constitution guarantees to all litigants. If the newspapers are permitted at will to comment on pending cases and to bring to the attention of the jurors sensational rumors and matters which cannot properly be considered in the determination of the issues before them, there can be no such trial. That such publications can be made with impunity is not asserted in any jurisdiction, so far as we know. The courts must be empowered to keep jurors from improper influence pending their deliberations."

The United States Circuit Court of Appeals of the Ninth Circuit in In re Independent Publishing Company, 240 Fed. 849, 862, states the law as follows: "Liberty of the press is subordinate to the independence of the judiciary, and it is not expedient that any class in the community should be privileged to interfere with the rights of litigants or to embarrass or obstruct the administration of justice."

[fol. 251] It is useless to further extend the citation of authorities upon this subject. The above are sufficient to show, we think, conclusively that the constitutional right of freedom of the press does not protect petitioners in the publication of the editorials contained in Counts 1, 3 and 5 respectively of the affidavit filed in the first of the two proceedings now before us. On the other hand, the law as expressed by the overwhelming weight of authority establishes that petitioners were not justified in the publications of said editorials concerning pending actions and that the order adjudging petitioners guilty of contempt of court as set forth therein should be affirmed.

Our attention has been called to the very recent cases of Schneider v. State of New Jersey, and others, decided, November 22, 1939, and reported in 60 Supreme Court Reporter, 146. These cases all involve ordinances of certain cities prohibiting the distribution of handbills within the municipality. It was held that these various ordinances were an infringement upon the constitutional guaranty of freedom of speech and the press. We are unable to discern any applicability of these cases to the case now before us. The principal claim in support of the constitutionality of these ordinances was that the circulation of handbills tendered to litter up the streets of the city and render them unsightly and offensive, and the purpose of the ordinances was to keep the streets clean from the litter and refuse re-

sulting from the indiscriminate distribution of the handbills. The court held that there were other methods of preventing such littering of the streets, among which the court suggested was the punishment of those who actually throw papers on the street. Furthermore, the court held that the [fol. 252] additional burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution was insufficient to justify the enactment of an ordinance which would infringe upon the constitutional guaranty of freedom of speech. In those cases the only detriment which might result from the distribution of handbills was the possible additional cost to the city in the cleaning of its streets. In the present case the detriment caused by the publication of said editorials was the probable denial of a fair trial to the litigants in the actions then pending before the courts which were the subject of said editorials. It appears to us that the inapplicability of those cases to the instant case is obvious.

The two editorials which formed the basis of the contempt proceedings and the subsequent conviction of certain of the petitioners as set forth in the record of the second of the two proceedings now before us were published on June 5th and 7th respectively in the Los Angeles Times, following the institution of the first of these two proceedings on June 3, 1938. The accusatory affidavit in the first of said proceedings was filed in the Superior Court of the County of Los Angeles on the 3d day of June, 1938, and on the same day said court issued an order requiring the respondents in said proceedings to appear on the 23d day of June, 1938, to show cause why they should not be adjudged guilty of contempt of court. The editorials in question were therefore published while the first of these two proceedings was pending in said court. The editorials are lengthy and for that reason are not set forth herein. The first of the two editorials was mainly devoted to a resume of the five cases commented [fol. 253] upon in the previously published editorials. These five cases at that time had reached a point of finality and were therefore subject to proper comment by any citizens. The second of the editorials consisted largely of a defense of the right of free speech and the freedom of the press. Each editorial referred to the pending contempt proceeding against petitioners and criticized the committee of the bar association for instituting said proceedings. The trial court in referring to the cases of In re Lindsley, 75 Cal.

App. 122, characterized the editorials involved in that case as "vitriolic and vituperative" and added "while here they cannot be so classed." The editorials were temperate and considerate and were free of any abusive or immoderate language. In fact, the trial court stated that the editorials constituted "an argument that might have been used upon the trial." In view of the authorities hereinbefore cited respecting the character of the publications which subject their authors to punishment for contempt of court, we are unable to hold that either of the two editorials published on June 5th and June 7th respectively, came within that class.

It is therefore ordered that the judgment of the trial court in case, L. A. No. 16,928 be and the same is hereby affirmed, and that the judgment in case, L. A. No. 16,929 be and the same is hereby reversed.

Curtis, J.

We concur: Shenk, J.; Carter, J.; Waste, C. J.; Pullen, J., pro tem.

[fol. 254] IN SUPREME COURT OF CALIFORNIA

DISSENTING OPINION OF JUDGE DOUGLAS L. EDMONDS

In the case of Bridges vs. The Superior Court, 98 Cal. Dec. 341, I stated at length the reasons for my opinion that Section 1209 of the Code of Civil Procedure is constitutional and should be upheld. This statute, which was adopted almost fifty years ago and within a few months after a newspaper editor had been found guilty of contempt of court, declares the public policy of the people of this state in regard to publications relating to a judge which are not made in the immediate presence of a court while in session and in such manner as to actually interfere with judicial proceedings.

Whether persons should be allowed to write or speak about a court or judge under the conditions mentioned in the statute, without being subject to prosecution for contempt of court in summary proceedings, is a question upon which there will always be great difference of opinion. But it is not the province of a court to determine the policy which is most conducive to human welfare and governmental stability. That is the legislative function, and the

judicial department may only determine whether the determination of the legislature violates a constitutional guarantee.

In my judgment, the opinions of this court in former cases where the statute was in question were written with more concern for upholding the inherent power of courts than for the constitutional guarantees of free speech and a free press. Yet the experience of New York and Pennsylvania, where laws similar to that of California have been in effect for over one hundred years, show that neither the existence of nor respect for courts has been seriously challenged by taking from judicial officers the uncontrolled right to pass upon alleged constructive contempts of court. Judi- [fol. 255] cial necessity based upon the claim of inherent power is neither reason nor authority for setting aside a statute which expresses the policy of the people of this state concerning acts which might otherwise be punishable as constructive contempts.

For these reasons I believe that each of the judgments should be reversed.

Douglas L. Edmonds.

[fol. 256] In Supreme Court of California

Dissenting Opinion of Gibson, J.

I dissent. The law as laid down in the Bridges case is controlling in this jurisdiction on the power of a court to punish summarily for constructive contempt. But, as I did not participate in the Bridges case, and the question is before me for the first time, it seems appropriate to express my views thereon. I disagree with the conclusion reached in the Bridges case and in the majority opinion herein, and I concur in the views of Justice Edmonds, dissenting in each case.

The rules laid down in these cases do not give adequate recognition to or protection for the constitutional right of free speech and press, but instead sacrifice that fundamental right for a need which is fancied rather than real. The integrity and independence of the court is not the only matter to be considered. There is the equally important and equally fundamental need of fearless comment on all activities affecting the public welfare, including the opera-

tions of the courts. To preserve one basic right at the expense of another is a doubtful gain. And, as very clearly appears from this and other proceedings, the two rights frequently come into conflict. When this happens, each must give way in some degree in order that a proper balance may be maintained, and both preserved. A court is usually most concerned with the immediate problem of safeguarding itself from outside influences during a pending proceeding; but in invoking drastic measures toward that end, it may do irreparable damage to the other fundamental right.

The assumption that to permit legislative regulation of the asserted inherent power of a court to punish summarily for constructive contempt would ultimately lead to its destruction, is without foundation. There is doubtless some justification for this fear where direct contempts, those which actually interrupt the court proceedings, are involved; but constructive contempts do not demand the same prompt and summary action. Their effect is indirect and not immediately felt; their punishment can likewise be delayed without injury to the court's prestige or procedure. [fol. 257] If the courts should actually be subjected to intimidation or other improper influences by persons immune from any punishment or restraint under the statute law, then the court could doubtless assert its power as an arm of the government in its own behalf. But no such situation has arisen either here or elsewhere, [illegible] doubt whether it ever could arise in normal times. However desirable it might seem from the viewpoint of the court to have this power, it is not in fact necessary to enable it to function and it is both safe and consistent with democratic principles to leave the matter within the control of the legislature.

The experience of those few states which have acquiesced in the legislative regulation of the court's power to punish for constructive contempt is ample proof of the fact that the courts function just as well and safely under such regulation as they do where they are entirely free from it. We have seen no signs and have heard no charges of disrespect or impaired efficiency with regard to the courts of Pennsylvania, Kentucky, New York or South Carolina, where the inherent power doctrine is not followed. In our own state an example of peculiar inconsistency is found in the rule on disqualification of judges. If, as the majority opinion holds, the inherent power of the courts makes them

immune from legislative interference, no regulation which limits that power can be valid. But we have upheld legislation which permits the challenge of a judge for bias or other disqualification in proceedings for constructive contempt. (See Briggs v. Superior Court, 211 Cal. 619.)

There is a growing belief among thoughtful students of this problem that the solution is to eliminate summary punishment and make the offense subject to the usual rules [fol. 258] of criminal trial. The court's integrity may be protected in the same manner as other rights of person and property and other institutions of government are protected. This is indeed, as Justice Edmonds shows, the historically correct position; the venture into summary punishment has been demonstrated to be both bad history and bad law. Today the security of the state and all of its departments, officers, and branches, except the judiciary, is protected from improper influences only by the general statute law enforceable by trial of the offender in the courts before a jury. We would, I am sure, be amazed at the suggestion that any other officer or body of government, executive or legislative, be given this potent power; yet to the intelligent observer who is not a judge of a court, the spectacle of a judicial officer acting as prosecutor and judge, and meting out punishment besides, must seem equally amazing. The same observer might further reflect on the fact that matters having a purely hypothetical tendency to interfere with a judicial proceeding are conceived to require a more drastic system of suppression and punishment than overt acts of treason or rebellion striking at the very foundation of the government. In time we shall, I believe, be brought to the conclusion that the normal course of trial is adequate and proper, and that either by a change in judicial viewpoint or by a constitutional amendment the legislative control will be recognized. (See comments, 48 Yale L. J. 54; 7 Geo. Wash. L. Rev. 234, 241.)

But this point is for the present settled by the Bridges case, and must be accepted as the basis of decision in the instant case. Conceding the power, therefore, a problem of equal importance and perhaps greater difficulty arises in defining its scope. The test adopted by the majority [fol. 259] opinion is the tendency of the publication to influence the proceeding. Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed tendency of the publication to affect and

not its actual effect which is involved. It is not the trial judge himself, but an hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the tendency alone is considered. Denial by the judge that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect.

This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views. We are all well aware of the constantly broadening scope of the judiciary as an interpreter of constitutional and statutory policies in the field of government, and there is grave danger in permitting a court to ward off criticisms directed at its policies, under the guise of protecting a particular court proceeding from improper influences. As Mr. Chief Justice Taft said, concurring in Craig v. Hecht, 263 U. S. 255, 279: "* * * the delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest."

[fol. 260] In the second place the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge. The present case furnishes us an excellent example of the confusion thus engendered. The Los Angeles Bar Association Committee, the trial judge and this court do not agree on the character of certain of the publications. The necessary result of such differences of opinion is to cause critics and commentators to limit or entirely forego their public function rather than to risk the uncertainties of contempt charges by temperamental judges.

In sharp contrast is the view of a few courts and nearly all of the writers that the publication should not be considered contemptuous unless it actually interferes with the orderly administration of justice. Under this test no remote possibility or tendency toward obstruction is sufficient.

Nor is the effect of the publication on a weak judge or a purely hypothetical judge the controlling factor. The judge is assumed to be possessed of a character commensurate with his position, and able to withstand the incidental effects of free public discussion of issues involved in a judicial proceeding. This attitude is well stated in Mr. Justice Holmes' dissenting opinion in Toledo Newspaper Company v. United States, 247 U. S. 402. And in the leading case of State v. American News Company (S. D.), 266 N. W. 827, 833, the court said:

"We believe that any publication to be punishable as contempt, should be embarrassing or obstructive to the administration of justice in a pending case, and obstructive in fact rather than in theory or by possibility. * * * We think the courts should reserve the use of the weapon of contempt for such publications as can fairly and reasonably [fol. 261] be said likely in point of actual fact to intimidate, influence, impede, embarrass, or obstruct the court in the due administration of justice in an actually pending matter. And we entertain the opinion that if error is made in either direction in determining that question, it is better and wiser to err in favor of absolute and unrestricted freedom of speech rather than in the other direction."

It seems to me that if we are to accept the doctrine of summary punishment for constructive contempt, the extraordinary power thus created and applied in defiance of the legislative will should be used sparingly and cautiously. We should not ignore the growing suspicion that courts are prone to place their own security above all other considerations. We should recognize the importance, indeed, the vital necessity of the fullest comment and criticism in matters of public interest, and not seek to exempt the courts from such criticism. The course of reform in the judicial field itself depends in part upon a free and vigorous press which should not hesitate to condemn where it finds the actions of the court subject to condemnation, and the editorial page cannot be confined to abstract academic discussion of non-controversial matters or of issues long dead. In short, we must look frankly at the realities; we must remember that many factors consciously or unconsciously influence judges, and that some are accepted as normal or unavoidable. We should apply the summary power, if at

all, only to those publications which appear to ordinary persons intended and calculated to work an unmistakable and unjustifiable influence upon a particular case.

In reading over the editorials adjudged contemptuous in the present proceedings, it is difficult to perceive the manner in which they were found to constitute an improper [fol. 262] interference with the administration of justice. Not one of them appeared until the verdict of the jury had been rendered after the conclusion of the trial. It was not proved that they were intended to exercise a prejudicial influence on the judge, nor that he saw or read them. The asserted contempt is derived entirely from the supposed tendency of the language used. We should expect, therefore, to find in them some formidable threat or intimidation, or at least some demands on the judge for specific action, coupled with suggestions of reprisal if the demands go unheeded. But these writings are not of this character.

The first editorial "Sit-Strikers Convicted" commends the conviction of certain persons as a victory for law and order and expresses pride in the functioning of local courts and juries. It refers to a radio address made by the district attorney and quotes a statement made by him congratulating the jury on one of the "most far reaching verdicts in the history of this country". There is certainly nothing in this editorial which should influence any judge in the performance of his duty.

The second editorial "The Fall of an Ex-Queen" is a brief and penetrating commentary on the political activities of Helen M. Werner. The subject of the editorial is used as an object lesson and the principal thought expressed therein is that political bosses rise and fall with changing times. I cannot find anything in this editorial which can be said to have even a remote tendency to obstruct the administration of justice or to influence or embarrass any judge.

The third editorial is entitled "Probation for Gorillas?" It is a denunciation of certain defendants found guilty of [fol. 263] deadly assaults in connection with a labor dispute. It abounds with such scathing terms as "wrecking crew", "sluggers for pay" and "thugs"; it urges that an example be made of them, and adds: "Judge A. A. Scott will make a serious mistake if he grants probation" to

these men. Now this is strong language, and the statement just quoted was ill advised and unfortunate, but it does not necessarily follow that it was contemptuous. The publisher's affidavit calls attention to the familiar fact that in probation proceedings outside opinions and recommendations are invited. It is further pointed out that a former Presiding Judge of the superior court advised the Times that a criticism of a certain probation order published after it was granted, should have been made while the matter was pending. It appears that the Times has blundered in following the example of a district attorney, and in taking the suggestion of a superior court judge, with reference to the propriety of commenting on judicial proceedings.

Consider, however, the character of the case, and the circumstances surrounding it. This was no everyday affair, but one in which the public interest was aroused, and the events were widely discussed in the community. The views expressed by the Times were those held and freely expressed by many others. The attitude of the Times is made abundantly clear, and its bitter feeling toward certain labor leaders colors its opinions, but what of that? The Times is not on trial for its opinions; its readers will judge those for themselves. The Times is charged with obstructing [fol. 264] justice and interfering with a pending judicial proceeding, and there is no evidence whatever of such obstruction or interference. The case had been tried, and verdict rendered; the jury was gone, and matters of sentence and probation were before the judge alone. In deciding these matters the judge has few, if any definite rules to guide him; he is influenced by countless experiences and observations, as well as by the total sum of impressions received from public and private comment on similar problems throughout his judicial life. In this group of impressions the present editorial, if actually seen and read, could hardly be said to occupy such a dominant place as to be obstructive or embarrassing.

And what if the judge was, in fact, aware of the views expressed in the third editorial; can it be said he was being informed for the first time of the position of the Times in cases of this character? Could there be any possible doubt in the mind of any informed resident of Los Angeles on the attitude of the Times in regard to the use of violence in labor disputes. The position maintained by the Times over

many years on these matters is clearly established by the record. Its Los Angeles readers would find nothing unusual in the editorial; a judge who felt that it was obstructive or embarrassing would have to confess ignorance of one of the most familiar facts of the daily life of his community. [fol. 265] If the power over contempt is to be fairly and reasonably applied, two essential limitations on the test of constructive contempt must be recognized. First, it should be applied only to those publications of an unusual and abnormal character, those which to a layman are obviously improper and dangerous, because vindictive, threatening or inciting to violence. It should be inapplicable to comments of the usual, normal and expected type which the ordinary intelligent layman constantly meets with in the public press, the radio and informal discussion. Second, it should be applied only where it clearly appears that the publication was intended to reach the particular judge and was seen and read by him; and then only where it was of such a nature as to influence improperly a judge of ordinary firmness. We should assume that judges specially chosen for their important positions are capable of maintaining an impartiality and independence where others might weaken; we should realize that a judge of ordinary firmness should be a person of exceptional independence and integrity, immune from all but extraordinary influences.

Finally, in determining whether there is a tendency to obstruct justice, we would give due consideration to the stage of the case at which the publication occurs. When a period of relative finality is reached, as by the rendition of a jury's verdict, the dangers of outside influence have been reduced to a minimum, and comment thereafter should be freely permitted. At this stage, the newspapers must fulfill their proper function of criticism, and if they fail to comment when a matter is timely, they will be ignored when their belated observations are eventually made. To say [fol. 266] that a case is pending until its final adjudication is to state a legal platitude in place of a practical doctrine. If the case is beyond the reach of discussion even after a jury's verdict, and until the final conclusion of proceedings for probation, new trial and appeal, there can never be anything of value in public discussion of such matters. In truth, both from the point of view of the law and practice,

no such theory is followed. The are but few cases which hold that comment after a jury's verdict and before sentence or judgment on appeal is contemptuous. (See 48 Yale L. J. 54, 61.)

Viewed in retrospect, these contempt charges were a regrettable mištake. No evidence of actual interference with any legal proceeding was produced. Nothing in the editorials was intended or calculated to thwart the rendition of impartial justice in the matters then before the court. No judge seems to have felt the pressure of improper influences. No disturbance of judicial calm occurred until after the accusations were filed.

All this is indicative of the lengths to which imagination may go in building groundless fears and in imputing potent and obstructive purposes foreign to the intent of the writer. I think that by our decision in this and the Bridges case we have sacrificed a substantial part of our cherished freedom of speech and press in order t stamp out an evil that does not exist.

The judgments should be reversed.

Gibson, J.

[fol. 267] IN SUPREME COURT OF CALIFORNIA

L. A. 16928—Times-Mirror Co. vs. Superior Court, L. A.
L. A. 16929—Times-Mirror Co. vs. Superior Court, L. A.

JUDGMENT

It is ordered that the judgment of the trial court in case L. A. 16928 be and the same is hereby affirmed, and that the judgment in case, L. A. No. 16929, be and the same is hereby reversed.

Curtis, J.

We concur:
Shenk, J.
Carter, J.
Waste, C. J.
Pullen, J. pro tem.

Dissenting opinion by Edmonds, J.
Dissenting opinion by Gibson, J.

January 31, 1949.

IN SUPREME COURT OF CALIFORNIA

L. A. 16928—Times-Mirror Co. vs. Superior Court, L. A.

ORDER DENYING REHEARING

By the Court:

The petition for a rehearing herein is denied, Edmonds, J. and Gibson, J. voting for a rehearing.

Dated: February 29, 1940.

Waste, C. J.

[fol. 268] IN SUPREME COURT OF CALIFORNIA

L. A. No. 16928

[Title omitted]

PETITION FOR ORDER STAYING EXECUTION AND ENFORCEMENT OF JUDGMENT

To Honorable William H. Waste, Chief Justice of the Supreme Court of the State of California:

Come now the petitioners herein, The Times-Mirror Company and L. D. Hotchkiss, and respectfully pray that an order be entered by the court in the above entitled cause staying execution and enforcement of judgment herein until and including three months after the order denying rehearing (if such rehearing be denied), and thereafter until final disposition of said cause by the Surpeme Court of the United States, in case on or before said date petitioners shall docket with the Clerk of said Supreme Court a petition for writ of certiorari, and in support of this motion petitioners represent as follows:

If petition for rehearing be denied, petitioners in good faith presently intend to file in the Supreme Court of the United States a petition for writ of certiorari in this cause as provided by the statutes of the United States in such cases made and provided, and in accordance with the rules of said Supreme Court.

Dated February 26, 1940.

The Times-Mirror Company and L. D. Hotchkiss, Petitioners, By Cosgrove & O'Neil, T. B. Cosgrove, F. B. Yoakum, Jr., By T. B. Cosgrove, Their Attorneys.

[fol. 269] IN SUPREME COURT OF CALIFORNIA

L. A. No. 16928

[Title omitted]

ORDER STAYING EXECUTION AND ENFORCEMENT OF JUDGMENT

Upon application of The Times-Mirror Company and L. D. Hotchkiss, by and through their counsel, for a stay of execution and enforcement of judgment of this court in the above entitled cause, to enable The Times-Mirror Company and L. D. Hotchkiss to apply for and obtain a writ of certiorari in the Supreme Court of the United States, and good cause appearing therefor,

It is Ordered that the execution and enforcement of said judgment be and the same hereby are stayed until June 1, 1940, to enable said The Times-Mirror Company and L. D. Hotchkiss to apply for and obtain a writ of certiorari in the Supreme Court of the United States.

It is Further Ordered that the aforesaid stay shall be continued in effect until final disposition of said cause by the Supreme Court of the United States in the event that on or before said June 1, 1940, there has been docketed with the Clerk of said Supreme Court the petition of The Times-Mirror Company and L. D. Hotchkiss for writ of certiorari.

Dated February 29, 1940.

William H. Waste, Chief Justice.

[fol. 270] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 271] IN SUPREME COURT OF THE UNITED STATES

STIPULATION RE PRINTING RECORD UNDER RULE 38(8), UNITED STATES SUPREME COURT RULES

It is Hereby Stipulated that the following portions of the typewritten Transcript of Record may be omitted from the printed record:

[fol. 272] 1. Page 31.

2. Pages 47 to 64, inclusive.

3. That portion of page 99, commencing with Roman Numeral "I", following "Writ of Review", to that portion

of page 106 ending with "People v. Fields, 131 Cal. App. 56, 57."

4. Page 107, and that portion of page 108 ending with "Commercial Bank v. Superior Court, 192 Cal. 395, 397."

5. Pages 111 and 112.

6. Page 115.

7. Page 117.

8. Page 119.

9. Page 140.

10. Pages 147 to 168, inclusive.

11. Pages 174 to 177, inclusive.

12. Pages 180 and 181.

13. Page 182, lines 14 to 22, inclusive.

14. Page 183, lines 11 to 19, inclusive.

15. Page 184, lines 19 to 26, inclusive.

16. Page 185, lines 15 to 22, inclusive.

17. Page 186, lines 12 to 16, inclusive.

18. Page 187, lines 1 to 5, inclusive.

19. Page 187, lines 21 to 24, inclusive.

[fol. 273] 20. Page 189.

21. Page 191.

22. Page 225.

Dated March 30, 1940, at Los Angeles, California.

Cosgrove & O'Neil, T. B. Cosgrove, F. B. Yoakum, Jr., By T. B. Cosgrove, Attorneys for Petitioners. J. H. O'Connor, County Counsel, Douglas DeCoster, Chief Deputy County Counsel, Allen W. Ashburn, Michael G. Luddy, Isaac Pacht, Arnold Praeger, By Allen W. Ashburn, Attorneys for Respondent.

[fol. 274] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted, and the case is assigned for argument immediately following No. 75.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 4 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 84 3

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

T. B. COSGROVE,
JOHN N. CRAMER,
Counsel for Petitioners.

F. B. YOAKUM, JR.,
Of Counsel.

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STATUTES CITED.

Constitution of the United States:
First Amendment 3, 4
Fourteenth Amendment 3, 4, 5
Judicial Code, Sec. 237b, as amended by Act of February 13, 1925, 43 Stat. 937 3

TEXT CITED.

Mr. Justice Brandeis (Yale University Press, 1932), pp. 108, 111 14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 972

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Times-Mirror Company, a corporation, and L. D. Hotchkiss respectfully petition, by their counsel, T. B. Cosgrove and John N. Cramer, for a writ of certiorari to review a decision of the Supreme Court of the State of California, 99 Cal. Dec. 108 and 98 Pac. (2d) 1029, rendered January 31, 1940, which affirmed judgments of conviction in contempt proceedings instituted on affidavit presented to the Superior Court of the State of California, in and for the County of Los Angeles.

A.

Summary Statement of the Matter Involved.

The Times-Mirror Company and Hotchkiss are the publisher and managing editor, respectively, of the Los Angeles Times (hereafter called "Times"), a newspaper of general circulation in the City of Los Angeles and State of California (R. 10).

On December 21, 1937, there was published in the Times an editorial entitled "SIT-STRIKERS CONVICTED" (R. 10-11); on April 14, 1938, an editorial entitled "THE FALL OF AN EX-QUEEN" (R. 17), and on May 5, 1938, an editorial entitled "PROBATION FOR GORILLAS?" (R. 23).[1]

On June 3, 1938, citation was issued requiring petitioners to show cause why they should not be adjudged guilty of contempt of court for the aforesaid publications (R. 25). The Times was adjudged guilty of contempt for publication of each of the editorials, and Hotchkiss was adjudged guilty as to the editorial "SIT-STRIKERS CONVICTED" (R. 60). Separate fines were imposed (with alternative jail sentence as to Hotchkiss) for each editorial (R. 60-61).

"SIT-STRIKERS CONVICTED" AND "THE FALL OF AN EX-QUEEN" commented on verdicts of guilty previously rendered by Los Angeles Superior Court juries (R. 10, 17). They were published prior to sentencing of the convicted defendants (R. 10, 17). "PROBATION FOR GORILLAS?" was published after verdict of guilt and while application for probation was pending (R. 23). This editorial stated that the trial judge (mentioned by name) "will make a serious mistake if he grants probation" to the defendants (R. 24).

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[1] The editorials are in the Record, pp. 11, 17-18, 22-24.

No evidence of interference with any court proceeding was offered and no showing was made that the editorials created a "clear and present danger" of interference (R. 66-85, 148). In affirming the convictions, the California Supreme Court concluded that "a reasonable tendency to interfere with the orderly administration of justice" (R. 122), constituting punishable contempt, appeared from the tenor of the editorials (R. 128, 130, 133).

B.

Statement Disclosing Basis of Jurisdiction.

1. Jurisdiction is invoked under Section 237b of the Judicial Code, as amended by Act of February 13, 1925 (43 Stat. 937).

2. The judgment of the Supreme Court of California was entered January 31, 1940 (R. 148). Petition for rehearing, timely filed, was denied February 29, 1940 (R. 149).

3. The nature of the case has been stated (*ante*, p. 2). Upon argument on demurrer to the contempt citation, petitioners asserted reliance upon the First and Fourteenth Amendments to the United States Constitution, guaranteeing freedom of speech and of the press (R. 4, 28). The trial court overruled the demurrer (R. 94), and rejected the contention that petitioners were protected by these constitutional guarantees (R. 98-106). Upon review by the California Supreme Court these constitutional guarantees were again asserted (R. 61). In affirming the convictions the Supreme Court of California held that these constitutional guarantees did not protect petitioners (R. 134-137). There were two dissenting opinions (R. 139, 140).

4. The conclusion of the California court that the editorials were an abuse of the constitutional guarantee of freedom of speech and of the press presents for determina-

tion a substantial question relating to the extent of these privileges when exercised by a discussion of judicial proceedings. The criterion established by the Supreme Court of California and the application thereof to the editorials in question is at variance with principles recently announced by this Court.[2]

5. The following cases are believed to sustain jurisdiction:
Schneider v. *New Jersey*, 308 U. S. 147, and cases therein cited in Footnote 8;
Near v. *Minnesota*, 283 U. S. 697;
Toledo Newspaper Co. v. *United States*, 247 U. S. 402, 411;
Eilenbecker v. *District Court*, 134 U. S. 31.

C.

The Questions Presented.

Broadly stated, the question presented is this:

Do the convictions for contempt unlawfully abridge the right of freedom of speech and of the press guaranteed by the First and Fourteenth Amendments to the United States Constitution?[3]

Stated more specifically:

1. Does the "reasonable tendency to interfere" test adopted by the state court unduly limit the constitutional right of freedom of speech and of the press?

2. Does the "reasonable tendency to interfere" test, as applied by the state court to the editorials, constitute an

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[2] *Herndon* v. *Lowry*, 301 U. S. 242, 256, 263; *Thornhill* v. *Alabama*, No. 514 U. S. Sup. Ct., this Term, decided April 22, 1940; *Carlson* v. *California*, No. 667 U. S. Sup. Ct., this Term, decided April 22, 1940.

[3] *Schneider* v. *New Jersey*, 308 U. S. 147, and cases therein cited in Footnote 8.

unlawful abridgment of the right of freedom of speech and of the press?

3. Does the "clear and present danger" test, rejected by the state court, constitute the correct criterion for determining limitations on the constitutional right of freedom of speech and of the press?

4. Does the "clear and present danger" test, if applied to the editorials, disclose a legitimate exercise of the right of freedom of speech and of the press?

D.

Reasons Relied on for the Allowance of the Writ.

1. The criterion applied in the state court in holding the editorials contemptuous, is that the editorials "had a reasonable tendency to interfere with the orderly administration of justice" (R. 122). The state court relied on *Patterson* v. *Colorado*, 205 U. S. 454 (R. 126), and *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (R. 135). Assuming the correctness of the test adopted, this Court nevertheless will inquire whether the test "as applied * * * denied * * * rights safeguarded by the Fourteenth Amendment."[4]

2. The "reasonable tendency" test unduly restricts vital constitutional privileges. The proper criterion is the "clear and present danger" test recently announced in *Herndon* v. *Lowry*, 301 U. S. 242, 256. The same test was applied by this Court in the present Term in *Thornhill* v. *Alabama*, No. 514, and *Carlson* v. *California*, No. 667, both decided April 22, 1940. The state Supreme Court rejected this

[4] *Herndon* v. *Lowry*, 301 U. S. 242, 247, 255. To the same effect, *Thornhill* v. *Alabama*, No. 514 U. S. Sup. Ct., this Term, decided April 22, 1940; *Carlson* v. *California*, No. 667 U. S. Sup. Ct., this Term, decided April 22, 1940.

test (R. 230) and referred to *Bridges* v. *Superior Court*, 98 Cal. Dec. 341, 358,[5] in support thereof. The legislative and executive branches of Government may not fetter freedom of expression[6] or punish the exercise of the right, unless the language used is "of such a nature as to create a clear and present danger" that it will bring about evils which may be prevented.[7] This Court should declare whether or not the judicial branch is subject to a similar restraint.

3. The ruling of the California court conflicts with the conclusions reached by the Supreme Courts of South Dakota and Indiana in *State* v. *American-News Co.*, 64 S. D. 385, and *Nixon* v. *State*, 207 Ind. 426, respectively. These decisions also dealt with alleged constructive contempts by publication. In view of the importance of the problem presented and the circumstance that "The constitution of every State in the Union guarantees to every citizen the right to freely speak, write, and publish his sentiments,"[8] it is necessary that this Court announce the criterion governing constructive contempt by publication to the end that desired uniformity will obtain.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of the State of California, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that

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[5] This Court granted certiorari in the *Bridges* case on April 8, 1940 (No. 759, October Term, 1939).

[6] *Near* v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233.

[7] *Herndon* v. *Lowry*, 301 U. S. 242, 256. To the same effect, *Thornhill* v. *Alabama*, No. 514 U. S. Sup. Ct., this Term, decided April 22, 1940; *Carlson* v. *California*, No. 667 U. S. Sup. Ct., this Term, decided April 22, 1940.

[8] *In re Shortridge*, 99 Cal. 526, 533.

the judgment herein of said Supreme Court of California be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated April 12, 1940.

THE TIMES-MIRROR COMPANY, a Corpotion and L. D. HOTCHKISS,
Petitioners,

By T. B. COSGROVE,
JOHN N. CRAMER,
Counsel for Petitioners.

F. B. YOAKUM, JR.,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 972

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The majority opinion of the Supreme Court of California (R. 120) is reported in 99 Cal. Dec. 108 and 98 Pac. (2d) 1029. The dissenting opinions (R. 139, 140) are reported in 99 Cal. Dec. 122 and 98 Pac. (2d) 1041. There is an unreported opinion of the trial judge (R. 95).

II.

Jurisdiction.

The basis of jurisdiction is given under heading "B" in the petition for Writ of Certiorari (*ante*, p. 3), and in the interest of brevity is incorporated here by reference.

III.

Statement of the Case.

A summary statement of the case appears under the heading "A" in the petition for writ of certiorari (*ante*, p. 2), and in the interest of brevity is incorporated here by reference. A more extended statement appears in the argument (*post*, p. 11 *et seq.*)

IV.

Specification of Errors.

The Supreme Court of California erred:

1. In adopting the "reasonable tendency" test as the criterion by which the propriety of the editorials was measured.

2. In concluding that the editorials had a "reasonable tendency" to interfere with the orderly administration of justice.

3. In refusing to adopt the "clear and present danger" test as the criterion by which the propriety of the editorials should be measured.

V.

ARGUMENT.

Summary of the Argument.

Point 1. The "reasonable tendency" test is an unconstitutional abridgment of the right of fredom of speech and of the press; it affords no reasonably certain dividing line between permissible and proscribed comment; it is a deterrent to the exchange of ideas on matters of great public interest.

Point 2. The erroneous conclusion of the state court that the editorials had a "reasonable tendency" to interfere with

the orderly administration of justice has sacrificed a freedom that "is the matrix, the indispensable condition, of nearly every other form of freedom" [9] "for a need which is fancied rather than real."[10]

Point 3. The "clear and present danger" test should be applied to determine the propriety of language claimed to interfere with the judiciary as well as to utterances claimed to offend against conventional penal statutes. This test affords a definite and certain standard. It will guarantee the exercise of an "essential liberty" [11] without jeopardizing the independence of the judiciary.

Point 1.

The "reasonable tendency" test is an unconstitutional abridgment of the right of freedom of speech and of the press; it affords no reasonably certain dividing line between permissible and proscribed comment; it is a deterrent to the exchange of ideas on matters of great public interest.

The editorials did not assail the court, impugn the motive of any judge, or contain any threat or suggestion of retaliation.

"SIT-STRIKERS CONVICTED" (R. 11) congratulated the county, its courts and law enforcement officers, upon the conviction of persons charged with violence in connection with a sit-down strike at a local airplane factory (R. 46). The attitude of the Times toward the open shop and its inflexible opposition to the closed shop and the sit-down strike was well known, and this editorial was but a reiteration of its frequently announced views on such matters (R. 43-48).[12]

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[9] *Palko* v. *Connecticut*, 302 U. S. 319, 327.

[10] Dissent of Mr. Justice Gibson (R. 140).

[11] *Lovell* v. *Griffin*, 303 U. S. 444, 452.

[12] Portion of affidavit of Harry Chandler, which affidavit was uncontradicted and accepted as true by the California Supreme Court (R. 134).

"THE FALL OF AN EX-QUEEN" (R. 17) was an analytical discussion of the sordidness of "boss-ship" in politics. The language was "temperate and considerate" and "free of any abusive or immoderate language."[13] An attempt was made to point out a persuasive moral. The editorial did "not refer to the case which was then pending" (R. 130), nor did it contain any suggestion respecting court proceedings.

"PROBATION FOR GORILLAS?" (R. 23) contained a statement of the Times' well-known views on labor violence and its opposition to the closed shop (R. 146-147). The editorial vigorously opposed granting of a pending petition for probation of two men convicted of felonies in labor disturbances. It is the established practice for probation officers to solicit opinions respecting the propriety of granting probation (R. 53), and such opinions are transmitted to the judge before whom the application for probation is pending (R. 53-54). Some time prior, and following the granting of a petition for probation, the Times had published an article declaring that probation should not have been granted, whereupon the then presiding judge of the Superior Court of Los Angeles County advised the Times that such objection should have been published while the petition was pending (R. 52). The District Attorney's office had, in one instance at least, written the trial judge before whom a petition for probation was pending, stating the views of the District Attorney as to the penalty which should be imposed (R. 55). Justice Gibson, in his dissenting opinion, points out "that the Times has blundered in following the example of a district attorney and in taking the suggestion of a superior court judge, with reference to the propriety of commenting on judicial proceedings" (R. 146).

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[13] From opinion of state Supreme Court reversing contempt conviction for other editorials (R. 139).

No showing was made either that the editorials came to the attention of any of the judges before whom the related matters were pending, or that any judge felt that he was influenced or embarrassed because of them. No one of the judges presiding in the related proceedings caused the contempt citations to issue.

Although verdicts of guilt had been returned in all the cases related to the editorials, the state Supreme Court held that the editorial comment constituted contempt of court because

> (1) "It cannot be successfully contended that the verdict was decisive of the case or was a final determination of the fate of the defendants" (R. 125), and
>
> (2) The "reasonable tendency [of the editorials] was to interfere with the ordinary administration of justice by the court in the action then pending before it" (R. 128).

Under this rule, before a citizen may exercise the constitutional right of freedom of speech, he must determine at his peril either that the fate of a defendant has been finally determined, or that his language may not have a reasonable tendency to interfere with the orderly administration of justice. Such standards are too vague and indeterminate to afford a constitutional basis for punishing for a claimed abuse of the exercise of what this court recently has termed "fundamental personal rights and liberties."[14] The "reasonable tendency" test "amounts merely to a dragnet which may enmesh anyone",[15] provided only that some judge may conclude that the citizen ought to have foreseen that his words might have a reasonable tendency to interfere with the ordinary administration of justice. In *Herndon v. Lowry, supra*, the statute, as construed, required the jury

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[14] *Schneider* v. *New Jersey*, 308 U. S. 147, 161.
[15] *Herndon* v. *Lowry*, 301 U. S. 242, 263.

to find that the defendant should have contemplated that his utterance might result in forcible resistance (301 U. S. 262), but according to the ruling of the State court in the *Times* case, intention is of no importance, if a judge sitting without a jury [16] concludes that the language used has a "reasonable tendency to interfere with the ordinary administration of justice." As stated by the trial court, it is immaterial that the utterance did not come to the judge's attention (R. 118).

This nebulous standard amounts in application to judicial censorship of comment, written or spoken, upon court proceedings. So serious may be the consequence resulting from a statement concerning judicial proceedings, so indefinite is the stage or zone where the permissible "point of finality" is reached, and so uncertain will be the average citizen whether his utterance may have a reasonable tendency to interfere with the orderly administration of justice, that, impelled by apprehension of criminal prosecution, he will remain mute despite his constitutional right of freedom of assemblage and discussion. As stated by an eminent legal scholar (now Mr. Justice Frankfurter):

> "Freedom of speech and freedom of assembly are empty phrases if their exercise must yield to unreasonable fear.
>
> • • • • • • •
>
> "The press is the most important vehicle for the dissemination of opinion. The Constitution precludes its censorship. Equally inadmissible should be all oblique methods to censor the press."
>
> Mr. Justice Brandeis (Yale University Press, 1932), pp. 108, 111.

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[16] The proceedings were summary—the state Supreme Court declaring unconstitutional the California statute prohibiting summary punishment for constructive contempt (R. 121); cf. *Bridges* v. *Superior Court*, 98 Cal. Dec. 350 *et seq.*

Point 2.

The erroneous conclusion of the state court that the editorials had a "reasonable tendency" to interfere with the orderly administration of justice has sacrificed a freedom that "is the matrix, the indispensable condition, of nearly every other form of freedom" "for a need which is fancied rather than real."

The judgment of conviction herein is, in effect, judicial censorship. Immunity from previous restraint does not exhaust the constitutional concept of freedom of speech and of the press. Subsequent punishment for innocent utterances must be prevented; otherwise the guarantee will be meaningless.[17]

The conclusion below that the editorials had a "reasonable tendency" to interfere violates these guarantees. The editorials have no "reasonable tendency" to influence or affect "a mind of reasonable fortitude."[18] No court ruling is assailed or criticized, no motive of any judge impugned, no threat implied or reprisal suggested. The erroneous conclusion that a "reasonable tendency" to interfere existed is occasioned by an improper application of the "reasonable tendency" test to an unwarranted construction of the meaning of the editorials. This court will inquire whether such application and construction has deprived petitioners of their constitutional rights.[19]

In testing the propriety of "Sit-Strikers Convicted", the court below indulged in assumptions and innuendoes

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[17] *Near* v. *Minnesota*, 283 U. S. 697, 715; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245-250; *Lovell* v. *Griffin*, 303 U. S. 444, 451.

[18] Justice Holmes dissenting in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425.

[19] *Herndon* v. *Lowry*, 301 U. S. 242, 247, 255; *Thornhill* v. *Alabama*, No. 514 U. S. Sup. Ct., this Term, decided April 22, 1940; *Carlson* v. *California*, No. 667 U. S. Sup. Ct., this Term, decided April 22, 1940.

neither pleaded nor proved.[20] It viewed the editorial "in the light of these considerations" (R. 128).

"THE FALL OF AN EX-QUEEN" is characterized as "a scathing denunciation" and a "caustic criticism" of the defendant which would have a disturbing effect upon the judge" (R. 130). To construe this editorial as "scathing" and "caustic" illustrates the manner in which the court has applied the "reasonable tendency" test. We submit that it was "temperate and considerate" and "free of any abusive or immoderate language."[21]

"PROBATION FOR GORILLAS?" is likened (R. 131) to the articles under review in *Patterson* v. *Colorado*, 205 U. S. 454.[22] This editorial is condemned as an "approach to the court" (R. 132), although the court points out that it is not improper to express one's opinion concerning the propriety of granting probation if this is done by observing the formality of submitting the opinion to the probation officer, who would present it to the court (R. 132-133).

This construction and application unduly restricts and circumscribes the right to comment on any phase of a judicial proceeding until it has reached such a point of finality

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[20] Viz: "• • • such an influential paper as the Los Angeles Times • • • could not help having an effect upon the trial judge • • •. It cannot reasonably be said that they would have no tendency to influence the trial judge • • •. The editorial may not have been intended, but it is capable of being construed, as a notice to the trial judge that no leniency should be extended • • •, that should the court act contrary to the suggestions • • •, it might well expect adverse criticism in the columns of The Times" (R. 128).

[21] From opinion of state Supreme Court reversing contempt conviction for other editorials (R. 139).

[22] Patterson's articles, in the language of the Colorado Supreme Court, "• • • charged this court, and certain of its judges, with having been influenced by corrupt motives in their rulings theretofore made in pending causes, and that they would be so influenced in the final disposition of the same. Such articles further charged that such motives would operate on the court in its final decision of a pending cause • • • in which no action had as yet been taken by the court." (*People* v. *News-Times Publishing Co.*, 35 Colo. 253, 391.)

as no longer to be newsworthy. It condemns expression of opinion concerning probation because the opinion appeared where all could know the attitude of the paper, rather than through the probation officer, in which latter event what would be tantamount to a private communication to the court would be unobjectionable.

The public is entitled to a discussion of pending problems of government. Each of the three coordinate branches of government is of equal concern to the average citizen. Public interest is aroused and discussion encouraged perhaps more by the publication of current matters than of past events. If a moral cannot be drawn or an opinion expressed until the subject matter is no longer of interest, the message will be so untimely that it "will be ignored."[23]

POINT 3.

The "clear and present danger" test should be applied to determine the propriety of language claimed to interfere with the judiciary as well as to utterances claimed to offend against conventional penal statutes. This test affords a definite and certain standard. It will guarantee the exercise of an "essential liberty" without jeopardizing the independence of the judiciary.

The "clear and present danger" test forbids legislative and executive restraint upon freedom of speech and of the press

> "* * * unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent * * *."
>
> Justices Brandeis and Holmes concurring in *Whitney* v. *California*, 274 U. S. 357, 373.

This test was adopted by this court in *Herndon* v. *Lowry*, 301 U. S. 242, 256. It was applied in the present Term in

[23] Dissent of Justice Gibson (R. 147).

Thornhill v. *Alabama*, No. 514, and *Carlson* v. *California*, No. 667, both decided April 22, 1940. It should likewise apply to the judiciary when a constructive contempt by publication is asserted. It is not more than equally important to maintain the independence of the judiciary than to preserve the state itself. From the viewpoint of the accused, the "clear and present danger" test *a fortiori* should be applied in constructive contempt proceedings. In a conventional criminal proceeding the accused may have a jury. In the instant case the proceeding was summary, the court holding unconstitutional the California statute prohibiting summary punishment for constructive contempt by publication (R. 121).[24]

Adoption of the "clear and present danger" test would necessitate a reversal. The record is barren of evidence indicating that the editorials created a clear and present, or any, danger to the orderly administration of justice. No judge before whom the related criminal cases had been tried read the editorials or heard of them, so far as the record discloses, or complained or intimated that he was embarrassed by them. The record is void of any complaint by any of the parties that the editorials were or might be prejudicial to their cause. Manifestly, no "clear and present danger" existed. The "reasonable tendency" test is but a "seductive cliche", which, as applied below, has substantially impinged upon and curtailed a vital and essential right. The "clear and present danger" test vitalizes and protects this right. It guards it from assault for hypothetical abuses which are but "pernicious abstractions." It gives adequate protection to the judiciary and yet protects the speaker or publisher from being "summarily laid

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[24] cf. *Bridges* v. *Superior Court*, 98 Cal. Dec. 350, *et seq.*

by the heels."[25] When the press is no longer free, the judiciary will not long remain independent.

> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."
>
> *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250.

> "The safeguarding of these rights (freedom of speech and of the press) to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."
>
> *Thornhill* v. *Alabama*, No. 514 U. S. Sup. Ct., this Term, decided April 22, 1940.

> "The battles for a free Press are a part of the march of democracy. From complete strangulation by an autocratic monarchy in England in the seventeenth century the Press has risen through heroic efforts to occupy a distinguished and necessary place in our form of government."
>
> *State* v. *American-News Co.*, 64 S. D. 385.

> "The most dearly prized offspring of our national liberty, is the freedom of the press."
>
> *Ex parte Hickey*, 4 Smedes & M. (Miss.), 751, 781.

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[25] Dissent of Justice Holmes and Brandeis in *Craig* v. *Hecht*, 263 U. S. 255, 281.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari should be granted.

T. B. COSGROVE,
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Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 64

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITIONERS' BRIEF.

T. B. COSGROVE,
JOHN N. CRAMER,
Counsel for Petitioners.

F. B. YOAKUM, JR.,
of Counsel.

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On Writ of Certiorari to the Supreme Court of California

PETITIONERS' BRIEF.

I.

Opinions Below.

The majority opinion (R. 120) of the Supreme Court of California is reported in 15 Cal. (2d) 99. The dissenting opinions (R. 139, 140) are reported in 15 Cal. (2d) 121, 122. The unreported opinion of the trial judge may be found (R. 95).

II.

Statement Disclosing Basis of Jurisdiction.

1. Jurisdiction is invoked under Sec. 237b of the Judicial Code, as amended by Act of February 13, 1925 (43 Stat. 937).

2. Judgment of the Supreme Court of California was entered January 31, 1940 (R. 148). Petition for Rehearing, timely filed, was denied February 29, 1940 (R. 149).

3. Upon argument on demurrer to a criminal contempt of court citation, petitioners asserted reliance upon the First and Fourteenth Amendments to the United States Constitution, guaranteeing freedom of speech and of the press (R. 4, 28). The trial court overruled the demurrer (R. 94) and ruled that petitioners were not protected by these guarantees (R. 98-106). The guarantees were asserted in the California Supreme Court (R. 61). The Supreme Court of California affirmed the convictions, holding that petitioners were not shielded by these guarantees (R. 134-137). There were two dissenting opinions (R. 139-140).

4. The following cases are believed to sustain jurisdiction:

Cantwell v. Connecticut, 310 U. S. 296;
Thornhill v. Alabama, 310 U. S. 88;
Carlson v. California, 310 U. S. 106;
Schneider v. New Jersey, 308 U. S. 147, and cases therein cited in Footnote 8;
Near v. Minnesota, 283 U. S. 697;
Toledo Newspaper Co. v. United States, 247 U. S. 402, 411.

III.

Statement of the Case.

The Times-Mirror Company and Hotchkiss are the publisher and managing editor, respectively, of the Los Angeles Times (hereinafter called "Times"), a newspaper of general circulation in the City of Los Angeles and State of California (R. 10).

On December 21, 1937, there was published in the Times an editorial entitled "SIT-STRIKERS CONVICTED" (R. 10-11); on April 14, 1938, an editorial entitled "THE FALL OF AN EX-QUEEN" (R. 17), and on May 5, 1938, an editorial entitled "PROBATION FOR GORILLAS?" (R. 23).

On June 3, 1938, summary [1] contempt of court proceedings were instituted against petitioners for the publication of said editorials (R. 25). The Times was adjudged guilty of criminal contempt for the publication of each of the editorials, and Hotchkiss as to "SIT-STRIKERS CONVICTED" (R. 60). Separate fines were imposed (with alternative jail sentence as to Hotchkiss) for each editorial (R. 60-61).

No evidence of interference with any court proceeding was offered, and no showing was made that the editorials created a "clear and present danger" of inter-

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[1] The proceedings were summary—the state Supreme Court declaring unconstitutional the California statute prohibiting summary punishment for constructive contempt (R. 121); cf. *Bridges v. Superior Court*, 14 Cal. (2d) 464, 479 et seq. Petitioners were not prosecuted for violation of *California Penal Code* Sec. 166, Subd. 8, which is relied on by respondent to sustain the judgment in respect to "PROBATION FOR GORILLAS?" (Br. Opp. Cert. 25).

ference (R. 66-88, 148). The trial judge expressly rejected the "clear and present danger" rule (R. 105-106). In affirming the convictions the California Supreme Court, which in *Bridges v. Superior Court,* 14 Cal. (2d) 464,[2] had also rejected this rule, concluded that "a reasonable tendency to interfere with the orderly administration of justice" (R. 122), constituting punishable contempt, appeared from the tenor of the editorials (R. 128, 130, 133).

Thereupon The Times-Mirror Company and L. D. Hotchkiss petitioned this court for a writ of certiorari (October Term 1939, No. 972), which was granted (R. 151, 310 U. S. ——).

"SIT-STRIKERS CONVICTED" (R. 11) was published the day following the rendition by a jury of a verdict of guilty against twenty-two defendants charged with a felony (R. 10). It spoke with approval of the courts, juries, and law enforcement officers of Los Angeles County following the prosecution and conviction of persons committing acts of violence in connection with a sit-down strike at a local airplane factory (R. 46). It stated in effect that the verdict was a warning that Union terrorism will not be tolerated in Los Angeles, particularly directing the warning to the Teamsters' Union, which was threatening to extend its political control to Los Angeles and vicinity (R. 48, 49). The attitude of the Times toward the open shop, and its inflexible opposition to the closed shop and the sit-down strike, were well known, and the editorial was but a reiteration of its fre-

[2] Certiorari granted No. 19, October Term 1940.

quently announced views on such matters (R. 43-48). At the time of publication, although the verdict of guilty had been returned by a jury, judgment had not yet been pronounced, nor sentence imposed (R. 10).

"THE FALL OF AN EX-QUEEN" (R. 17) was published two days following the rendition by a jury of a verdict of guilty as charged against two defendants indicted for felonies, namely, attempted grand theft and violating Sec. 653f of the Penal Code (soliciting a bribe) (R. 16-17). The editorial was an analytical discussion of the sordidness of "boss-ship" in politics. It attempted to point out a persuasive moral. It did "not refer to the case which was then pending" (R. 130), nor did it contain any suggestion respecting future court proceedings.

"PROBATION FOR GORILLAS?" (R. 23) was published about two weeks subsequent to the rendition of jury verdicts of guilty as charged against two defendants charged with a felony, namely, assault with a deadly weapon (R. 23). At the time of publication the convicted defendants had applied for probation and the trial judge had set a date (five weeks subsequent to the date of the publication of the editorial) for hearing the application and pronouncing judgment (R. 23). The editorial contained a statement of the Times' well-known views regarding the use of violence in labor disputes (R. 146-147). It vigorously opposed the granting of probation to the two men convicted of assaulting non-union truck drivers (R. 23). It stated that the trial judge (mentioned by name) "will make a serious mistake if he

grants probation," and that the "community needs the example of their assignment to the jute mill" (R. 24).

The editorials did not assail or comment unfavorably upon the courts or any judge thereof. There was no intimation of threat or dissatisfaction with proceedings had and taken or contemplated.

The editorial "SIT-STRIKERS CONVICTED" commented favorably upon court proceedings and law enforcement agencies, which proceedings resulted in the conviction of numerous defendants. There was no reference to any pending or contemplated action or proceeding.

The editorial "THE FALL OF AN EX-QUEEN" made no reference to any court proceeding. (The Supreme Court of California so admits, R. 130.) In mild and temperate language the editorial pointed a moral, viz., the normal and inevitable consequences of the law's violation, even though, as the editorial pointed out, the convicted defendant was actuated by ambition for power rather than a desire for money. It might well have emanated from the professor, the parent, or the pulpit.

The editorial "PROBATION FOR GORILLAS?" related directly to a pending application for probation by two defendants who stood convicted of a felony. Under the California law:

1. Probation could not be granted,[3] and

2. Probation proceedings do not involve questions of

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[3] *In re Sheffield*, 18 Cal. App. (2d) 177, 178.

law and the established rules for the conduct of trials are not applicable.[4]

There was no showing that any of the editorials came to the attention of any of the judges before whom the related matters were pending; that any trial judge felt that he was influenced or embarrassed because of any of them; that any of the defendants in the related cases suggested or complained that any prejudice resulted to them because of the editorials; nor was there any showing of an intent on the part of petitioners to influence or embarrass the proceedings in the related cases. Petitioners under oath denied the existence of any such intent (R. 31, 33, 35, 37, 39, 41).

IV.

Specification of Errors.

The Supreme Court of California erred:

1. In refusing to adopt the "clear and present danger" test as the criterion by which the propriety of the editorials should be measured.

2. In adopting the "reasonable tendency" test as the criterion by which the propriety of the editorials was measured.

3. In concluding that the editorials had a "reasonable tendency" to interfere with the orderly administration of justice.

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[4] *People v. Jones*, 87 Cal. App. 482;
People v. Freithofer, 103 Cal. App. 165;
People v. Fields, 131 Cal. App. 56;
People v. Blankenship, 16 Cal. App. (2d) 606.

V.

The Questions Presented.

1. Is the "clear and present danger" test, rather than the "reasonable tendency" test, applicable in proceedings to punish for constructive contempt by publication?

2. If not, did the editorials in question have a "reasonable tendency" to interfere with the orderly administration of justice?

VI.

ARGUMENT.

Summary of the Argument.

Point 1. The "clear and present danger" test, rather than the "reasonable tendency" test, should be applied to determine the propriety of language claimed to interfere with the judiciary as well as to utterances claimed to offend against conventional penal statutes. This test affords a definite and certain standard. It will guarantee the exercise of an "essential liberty" [5] without jeopardizing the independence of the judiciary.

Point 2. The erroneous conclusion of the state court that the editorials had a "reasonable tendency" to interfere with the orderly administration of justice has sacrificed a freedom that "is the matrix, the indispensable condition, of nearly every other form of freedom" [6] "for a need which is fancied rather than real." [7]

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[5] *Lovell v. Griffin*, 303 U. S. 444, 452.

[6] *Palko v. Connecticut*, 302 U. S. 319, 327.

[7] *Times-Mirror Co. v. Superior Court*, 15 Cal. (2d) 99, dissent of Mr. Justice Gibson (R. 140).

POINT 1.

The "clear and present danger" test, rather than the "reasonable tendency" test, should be applied to determine the propriety of language claimed to interfere with the judiciary as well as to utterances claimed to offend against conventional penal statutes. This test affords a definite and certain standard. It will guarantee the exercise of an "essential liberty" without jeopardizing the independence of the judiciary.

The "Clear and Present Danger" Doctrine Should Have Been Applied.

The California Supreme Court held that the editorials were contemptuous because they had "a reasonable tendency to interfere with the orderly administration of justice" in pending actions (R. 122), relying principally upon *Bridges v. Superior Court*, 14 Cal. (2d) 464,[8] *Toledo Newspaper Co. v. United States*, 247 U. S. 402, and *Patterson v. Colorado*, 205 U. S. 454. The court expressly rejected the "clear and present danger" test in the *Bridges decision* (14 Cal. (2d) 491) and accordingly rejected it in the instant proceeding. The trial court categorically refused to apply such test (R. 105-106).

Censorship (direct or devious) of freedom of speech or of the press cannot be imposed by legislative,[9] executive,[10] or judicial[11] arms of the government—federal or

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[8] Certiorari granted No. 19, October Term, 1940.
[9] *Schneider v. New Jersey*, 308 U. S. 147.
[10] *Lovell v. Griffin*, 303 U. S. 444.
[11] *Cantwell v. Connecticut*, 310 U. S. 296.

state. Recent decisions make clear that an utterance may not be punished as a crime

> " * * * unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent * * * ." [12]

This doctrine ("clear and present danger") was first adopted by a majority of this court in *Herndon v. Lowry*, 301 U. S. 242, 256. During the October Term, 1939, this court applied the test on three occasions [13] and in effect invoked it on a fourth.[14] Perhaps its fullest exposition appears in Mr. Justice Brandeis' concurring opinion in the *Whitney case*. It is there declared that to support a finding of a "clear and present danger" it must be shown:

> 1. That immediate serious violence was expected or advocated or that the past conduct of the speaker furnished reason to believe that such advocacy was then contemplated (274 U. S. 376);
>
> 2. That no danger flowing from speech shall be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may occur before there is a chance for full discussion (274 U. S. 377);
>
> 3. That speech cannot be prohibited in order to avert a relatively trivial harm to society (274 U. S. 377);

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[12] Justices Brandeis and Holmes concurring in *Whitney v. California*, 274 U. S. 357, 373.

[13] *Thornhill v. Alabama*, 310 U. S. 88;
Carlson v. California, 310 U. S. 106;
Cantwell v. Connecticut, 310 U. S. 296.

[14] *Schneider v. New Jersey, supra.*

4. The fact that speech is likely to result in violence is not enough to justify its suppression; there must be a probability of serious injury to the state (274 U. S. 378).

If this criterion is applied to alleged constructive contempts by publication, it would seem necessary that it be shown:

1. That an immediate and serious interference with the administration of justice was expected or advocated; or

2. That the past conduct of the publisher furnished reason to believe that such advocacy was then contemplated; and

3. That the event of the interference is so imminent that it may occur before there is a chance for full discussion.

A fanciful disturbance of judicial calm or a speculative prejudice to litigants as a result of the utterances will not suffice. There is a greater social interest in the preservation of freedom of speech and of the press than there is in the elimination of hypothetical evils.

Application of the "Clear and Present Danger" Doctrine Discloses That the Publications Constituted a Proper Exercise of the Constitutional Guarantee of Freedom of the Press.

Judged by the "clear and present danger" standard, the contempt convictions cannot be supported. No proof was adduced that any judge had read the editorials or even heard of them. No judge testified that he had been embarrassed or made to feel apprehensive that, if he extended leniency to any of the convicted defendants, he would meet with reprisal, criticism or condemnation. There was no showing that any of the defendants contended they were or might be prejudiced as a result of the editorials, nor did it appear that the past conduct of petitioners furnished reason to believe that if the courts decided contrary to the assumed views of the Times, denunciation or criticism of the judges would appear in the columns of the paper. The juries that convicted the defendants had been dismissed. With the exception of "PROBATION FOR GORILLAS?", there was no "suggestion" as to what should be done with any of the defendants. "PROBATION FOR GORILLAS?" was published five weeks prior to the time set for hearing the application for probation (R. 23). Is the evil which the California court assumed would arise from this so imminent that punishment may constitutionally be imposed? No judge or court was exposed to ridicule or obloquy. We feel with Mr. Justice Gibson that "no disturbance of judicial calm occurred until after the accusations were filed" (R. 148).

The record is void of any evidence of an obvious or imminent serious danger of interference with the functioning of the courts as a consequence of these utterances. The assumed dangers were by no means as proximate as those involved in the *Cantwell case*. Cantwell's phonograph record, expounding strictures against the Roman Catholic Church (in a neighborhood composed of ninety per cent Roman Catholic residents (310 U. S. 301)), was highly offensive to the persons Cantwell had approached, one testifying that he felt like hitting Cantwell; the other that he was tempted to throw him off the street (310 U. S. 309).

There is greater need, from the standpoint of protection of freedom of speech, that the "clear and present danger" standard be applied in proceedings to punish for constructive contempt by publication than in conventional criminal proceedings seeking to punish utterances claimed to offend against espionage laws, syndicalism acts or legislation of similar purport. In the latter classes of cases the accused has the benefit of a jury. But in California, in constructive contempt proceedings, no jury is tolerated. The courts have declared unconstitutional the legislative intention that such contempts shall not be punished summarily.[15] A majority of state courts yet mistakenly adhere to the doctrine that the legislature may not defeat the "inherent" right of the courts to proceed summarily in constructive contempt proceedings.[16] The judge before

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[15] *Bridges v. Superior Court*, 14 Cal. (2d) 464, 478, 479-484.

[16] 37 *Harvard Law Review*, 1010; 28 *Columbia Law Review*, 401-431, 525-553.

whom an alleged contemner is hailed is the sole arbiter of his fate. Frequently the very judge or court allegedly contemned passes upon the guilt of the speaker or editor.[17]

Former Decisions of This Court Dealing With Constructive Contempt by Publication Were Rendered Prior to Adoption of the "Clear and Present Danger" Doctrine.

Counsel for respondent assert (Br. Opp. Cert. 40) that the "clear and present danger" test was not intended to apply to constructive contempt proceedings, basing their contention upon the fact that to date this court has not applied the doctrine to such causes. Reliance is placed upon *Toledo Newspaper Co. v. United States,* 247 U. S. 402, *Sinclair v. United States,* 279 U. S. 749, and *Associated Press Co. v. National Labor Relations Board,* 301 U. S. 103. Of these decisions the *Toledo case* alone deals with constructive contempt by publication. It was decided prior to the adoption of the "clear and present danger" doctrine. The constant and repeated intemperate attacks upon the court and the railroad company (which came to the personal attention of the district judge (220 Fed. 461)), the urging of the public to disregard the court's injunction, the inflamed local feeling and the exhortations to indulge in force, constitute a fundamentally different and readily distinguishable factual situation than exists in the Times case.

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[17] *Trial of James Peck,* by Benjamin Stansbury;
People v. News-Times Publishing Co., 35 Colo. 253 (*Patterson case*);
In re San Francisco Chronicle, 1 Cal. (2d) 630;
United States v. Toledo Newspaper Co., 220 Fed. 458 (*Toledo case*).

The *Sinclair decision* involved jury-shadowing. It was not a free-speech case. The Constitution does not guarantee the right to shadow juries. It does guarantee the right of free speech. The states have broad discretion in the regulation of overt acts, but not so in attempts to restrict the exercise of freedom of speech.[18]

The cursory statement in the *Associated Press case* that newspapers are subject to punishment for contempt of court, is not helpful in solving the problem here presented.

The Doctrine Has Not Been Restricted in Its Application to Utterances Creating An Imminent Danger of Overthrow of Organized Government.

The "clear and present danger" doctrine has not been restricted in application to utterances creating imminent danger of overthrow of organized government, as stated by respondent (Br. Opp. Cert. 42). During the October Term, 1939, it was applied by this court in the *Thornhill* and *Carlson cases* to picketing activities, and in the *Cantwell case* to the activities of members of Jehovah's Witnesses. Counsel for respondent (Br. Opp. Cert. 42) quote an excerpt from the opinion of the trial court in which it is asserted that application of the "clear and present danger" criterion would "mean that one contempt, or possibly two or more, would of necessity be passed by as unimportant, that the court could act only

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[18] cf. Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 377-378;
Schneider v. New Jersey, 308 U. S. 147, 161.

after so many contempts had been committed that the courts and the government would have been undermined * * * " (R. 106). This excerpt clearly indicates the failure of the trial court and counsel for respondent to appreciate the true effect of the "clear and present danger" doctrine. The test, if applied to contempt proceedings, would not justify interference with one judge or one judicial proceeding. It does not mean "that the court could act only after * * * the courts and the government would have been undermined." All that need appear is that an immediate and serious interference with a court proceeding was advocated or was to be expected.

... Tendency" Standard May Have Been the Ancient Criterion Governing Constructive Contempt by Publication, This Does Not Justify Its Application Under the Terms of the Federal Constitution.

Respondent's counsel attempt to justify the "reasonable tendency" criterion on the ground that it "is the ancient common law standard applicable to contempt of court" (Br. Opp. Cert. 51). This begs the question whether the standard is sufficiently definite to enable a person to differentiate between right and wrong. The "tendency to provoke disorder," which was held to be a crime by the Connecticut courts in the *Cantwell case*, was "a common law concept" (310 U. S. 296, 308); this recourse to antiquity did not sustain Cantwell's conviction.

Prevention of Assumed Disturbances of Judicial Calm Does Not Justify Suppression of Expression.

In the final analysis respondent's contention is that *if* the editorials had been seen by the judges, they *might* have been *embarrassed, disturbed* or *unconsciously influenced* by them (Br. Opp. Cert. 52). Under respondent's conception of the problem these effects are undesirable and therefore the publications are a contempt. The answer to this contention is complete, viz., a court "may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." [19]

Protection of the Courts Is Not More Important Than Protection of Organized Government.

Protection of the courts from interference, we believe, is not more important than protection of the state from destruction. The courts are but an arm of the state. This arm may not restrain or punish speech unless it constitutes a "clear and present danger" of serious interference. To hold otherwise is to say that preservation of the limb is more essential than preservation of the trunk—that a part is greater than the whole.

The Supreme Courts of South Dakota [20] and Indiana [21] have refused to apply the "reasonable tendency" test in proceedings for constructive contempt by publication.

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[19] *Cantwell v. Connecticut*, 310 U. S. 296, 308.
[20] *State v. American-News Co.*, 64 S. D. 385.
[21] *Nixon v. State*, 207 Ind. 426.

These recent and enlightened decisions give proper recognition to the importance of maintaining the right of free speech and a free press.

The Vagueness of the "Reasonable Tendency" Test Is Condemned In the Cantwell Decision.

The "reasonable tendency" test applied by the California court is analogous in its vagueness and uncertainty to the common law offense of inciting a breach of the peace condemned by this court in the *Cantwell case*. There the indictment charged that the phonograph record played by Cantwell had disturbed public tranquility by "tending to provoke or excite others * * * to break the peace" (126 Conn. 1, 2). In reversing Cantwell's conviction this court declared:

> " * * * the judgment is based on a common law concept of the most general and undefined nature.
>
> * * *
>
> "Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."
>
> 310 U. S. 296, 308.

Freedom of speech (when claimed to conflict with the judiciary) will exist in theory but not in practice if its exercise must be made at the risk of some judge concluding from a subjective consideration of the statement that the utterance had a "reasonable tendency" to interfere with the orderly administration of justice. This nebulous standard—"reasonable tendency"—amounts in

application to judicial censorship of comment upon court proceedings. So serious may be the consequences resulting from a public utterance concerning judicial proceedings, so indefinite the zone where a permissible "point of finality" of the proceeding is reached, and so uncertain will be the average citizen whether his utterance may have a "reasonable tendency" to interfere with the orderly administration of justice, that, impelled by the apprehension of criminal prosecution, he will remain silent despite his constitutional right of freedom of discussion. Thus will "oblique methods" [22] of censorship be established.

Uncertainty of the "Reasonable Tendency" Test Is Here Demonstrated.

That uncertainty exists in judicial circles concerning the scope of the "reasonable tendency" test is established by the history of this proceeding. The Contempt Committee of the Bar Association charged petitioners with seven contempts arising out of seven published editorials (R. 109; 111-114; 116-117). The trial court held that two of the editorials were not (R. 112, 114), but that five were contemptuous (R. 111, 113, 116-117). Of these five, a majority of the California Supreme Court held that but three of the editorials were contemptuous (R. 139). Two justices dissenting held that no one of the five was contemptuous (R. 140, 148).

With such divergence and conflict of opinion among jurists and judges, what may be expected of the layman

[22] Mr. Justice Brandeis (*Yale University Press, 1932*), p. 111.

—the editor—the orator—the public—wishing to exercise the p .vilege of free discussion of matters of public consequence?

Of the "reasonable tendency" test, Mr. Justice Gibson in his dissent stated:

> "This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press.
>
> * * *
>
> " * * * the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge."
>
> (R. 143.)

Proscription of Comment Until the Point of Finality Announced by the State Court Has Been Reached Amounts to Judicial Censorship.

Not only is the "reasonable tendency" test vague, elastic and varied, but until such point of finality has been reached that the case no longer will be newsworthy, comments on causes, in which verdicts of guilty have been returned, are prohibited. The California Supreme Court has held that so long as the case is pending such comment "comes within those prohibited acts, the commission of which renders those responsible therefor liable to the punitive powers of the court" (R. 130).

As we have stated, the perid of prohibition is indefinite. It certainly may extend for at least five weeks, as is shown in the criminal action referred to in the third editorial, "PROBATION FOR GORILLAS?" (R. 23). The extent of the period of prohibition may be de-

termined by the trial judge in his discretion from considerations of convenience of court or counsel, or for other reasons peculiar to the particular case and having no logical relation to public interest. It is not necessary that a motion for new trial or application for probation be actually pending, for the period of prohibition continues as long as the defendants have the right to pursue such remedies (R. 125). The California Supreme Court declares: "It cannot be successfully contended that the verdict was decisive of the case or *was a final determination of the fate of the defendants*" (R. 125). The language of the majority opinion just quoted is inconsistent with the letter and the spirit of the Federal Constitution, and if enforced would destroy privileges guaranteed by the Bill of Rights and would lead to absurd results.

If two men are convicted of murder, *"a final determination of the fate of the defendants"* would date from the time of their execution. Employing the language of the majority opinion, until the time of their execution it cannot be successfully contended that the verdict was decisive of the case or was a final determination of the fate of the defendants." If one charged with murder pleads guilty and is sentenced to death, prior to his execution newspapers may not comment upon the enormity of the crime or the depravity of the defendant, for the reason that a writ of error *coram nobis* is still available. Such writ, with its accompanying delay, is occasionally, and recently has been, successfully resorted to in California.[23]

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[23] *People v. Campos*, 3 Cal. (2d) 15.

The "Clear and Present Danger" Test Is Objective; the "Reasonable Tendency" Test Subjective.

The "clear and present danger" test is not the same as the "reasonable tendency" test, as respondent asserts (Br. Opp. Cert. 42-44). The former is objective; the latter subjective. The "clear and present danger" test submits to the trier of the proceeding the task of passing upon facts, viz., the circumstances under which the utterance is made, its tenor, the temper of the times, the past conduct of the speaker relative to matters of similar import, and whether the utterance ever came to the attention of the court. Such matters men are qualified to appraise rationally. But a presumed "tendency" cannot be accurately or objectively evaluated. The "tendency" of an utterance is good or bad, as it conforms with or differs from the subjective opinion or sensibilities of the civil magistrate.[24]

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[24] *Reynolds v. United States*, 98 U. S. 145, 163; Jefferson's Preamble to Virginia Act for Establishing Religious Freedom, quoted in *Chafee—Freedom of Speech*, p. 31.

POINT 2.

The erroneous conclusion of the State Court that the editorials had a "reasonable tendency" to interfere with the orderly administration of justice has sacrificed a freedom that "is the matrix, the indispensable condition, of nearly every other form of freedom" "for a need which is fancied rather than real."

If this court concludes that the "reasonable tendency" test of the California Supreme Court is sufficiently definite and affords a proper latitude to the expression of opinion, we then submit for consideration that the editorials had no "reasonable tendency" to interfere with the orderly administration of justice. The contrary conclusion of the California Supreme Court results from an improper application of the test and an untenable construction of the language of the editorials. This court will inquire whether such application and construction have deprived petitioners of the right of freedom of speech and of the press.[25]

Concerning certain statements appearing in "SIT-STRIKERS CONVICTED," the California Supreme Court said:

> "It cannot reasonably be said that they would have no tendency to influence the trial judge * * * ." (R. 128.)

Thus, punishment is inflicted—not because the editorial had a "reasonable tendency" to interfere, but because "it cannot reasonably be said" that it "would have no tendency to influence."

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[25] *Herndon v. Lowry*, 301 U. S. 242, 247, 255.

Despite petitioners' denial of any intention to influence, the California Supreme Court declared:

> "The editorial may not have been intended, but it is capable of being construed, as a notice to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that should the court act contrary to the suggestions contained in the editorial, it might well expect adverse criticism in the columns of the Times. Viewing the editorial in the light of these considerations, we are satisfied that its reasonable tendency was to interfere * * * ."
> (R. 128.)

Innuendoes are ascribed to the editorial which were neither pleaded nor proved, and a construction placed upon it other than the one which the California Supreme Court concedes may have been intended by its author. This indicates persuasively the dangers to freedom of speech when its exercise is claimed to have interfered with the proper functioning of the judiciary.

The Chandler affidavit (R. 42-52) was stipulated to be true (R. 134). It sets forth at length the policy of the Times toward labor violence and the sit-down strike, and makes clear that the editorial "SIT-STRIKERS CONVICTED" was but a reiteration of the opinion of the Times on the use of violence in labor controversies, expressed on numerous occasions during the past fifty years. Though the California Supreme Court pointed out that the statements in the affidavit were true, it said that the affidavit did no more than create a conflict in the evidence which the trial court had resolved against petitioners (R. 134). The court did not point out the evidence with which the affidavit conflicted. Aside from the

affidavit there is no evidence in the record on the subject. Despite the uncontradicted facts of the affidavit, which the Supreme Court declares are true (R. 134), the trial court nevertheless considering the editorial subjectively —i. e., independent of the record—concluded otherwise. This conclusion of the trial court, the Supreme Court says created a conflict in the evidence (R. 134).

Mr. Justice Gibson states in his dissent:

> "Could there be any possible doubt in the mind of any informed resident of Los Angeles on the attitude of the Times in regard to the use of violence in labor disputes. The position maintained by the Times over many years on these matters is clearly established by the record. Its Los Angeles readers would find nothing unusual in the editorial; a judge who felt that it was obstructive or embarrassing would have to confess ignorance of one of the most familiar facts of the daily life of his community."
>
> (R. 146-147.)

We do not comprehend how this editorial (fairly construed) could have a "reasonable tendency" to influence or affect a judge possessed of "a mind of reasonable fortitude."[26]

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[26] Mr. Justice Holmes dissenting in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 425.

Realization by a Judge That His Decision Will Be Unpopular Is No Indication of Influence.

Possibly a local judge might realize (in such matters are given consideration by him) that if he extended leniency to the defendants, the Times would regard such a ruling as a mistake. Likewise he would realize, as stated by the Times in "PROBATION FOR GORILLAS?," that, if probation were granted, the Times would consider that he had made a serious mistake. Likewise, he would realize that if he did not extend leniency to the defendants, the labor groups of the community would consider that he had made a serious mistake. Doubtless his feeling in this respect would be the same irrespective of the publication of the editorials. But it cannot be the rule that merely because a judge realizes that his decision will not find favor in all quarters, he is thereby influenced. If this be the criterion, then in all cases wherein public interest is aroused, the judge will know prior to rendition of his decision that a "reasonable tendency" to influence exists. He will appreciate that his ruling will be viewed with dissatisfaction by that group entertaining contrary views. Realization of diverse public opinion is a necessary and probably desirable concomitant of our system of government. A free press, free assemblage, and free discussion contribute in large measure to the formation of public opinion.[27] In this country judges cannot be immunized against the apprehension of criticism. Judges do not ren-

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[27] *Grosjean v. American Press Co.*, 297 U. S. 233, 250.

der decisions in a legal vacuum.[28] Public interest is usually greater in contemporary than in past events; discussion should accompany the event; if discussion is delayed, the speaker's message "will be ignored,"[29] or the moment for its consideration may have passed.

No One of the Editorials Interfered or Was Calculated to Interfere With the Administration of Justice.

There is nothing in "SIT-STRIKERS CONVICTED" which constitutes a threat against any judge or a suggestion of reprisal in event of a decision contrary to the views expressed in the editorial, as is assumed by respondent (Br. Opp. Cert. 16-21). In fact, no suggestion is made in the editorial respecting any pending matter or its future disposition. It does not follow, from the circumstance that the judge might feel distressed if required to deal with defendants in a manner other than that "suggested" by the Times, that the courts "may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern."[30] This editorial, fairly interpreted in the light of existing local conditions and the well-known views of the Times upon labor disputes, did not have the "potentiality of inducing action in the interests of one rather than another

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[28] "The felt necessity of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudice which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." (Holmes—The Common Law, p. 1.)

[29] Mr. Justice Gibson dissenting (R. 147).

[30] *Thornhill v. Alabama*, 310 U. S. 88, 104.

group in society."[31] If it had such potentiality, we understand the *Thornhill decision* to condone it. If a judge were so lacking in mental fortitude that this editorial would cause him to fear and submit to fear of adverse criticism by the Times, the existence of such isolated mental susceptibility will not justify abridgment of freedom of speech.

"PROBATION FOR GORILLAS?," published five weeks prior (R. 23) to the time set for hearing an application for probation of two individuals convicted by a jury of felonious assault upon non-union truck drivers (R. 51-52), vigorously opposed the granting of probation and stated that Judge Scott (the trial judge) "will make a serious mistake if he grants probation" (R. 24). The California Supreme Court characterized the editorial as

> "a striking example of a 'premature statement, argument, and intimidation' respecting the case on trial which the court condemned and held to be contumacious in the case of Patterson v. Colorado."
> (R. 131.)

Comparison of the editorial with those involved in *Patterson v. Colorado* lucidly indicates the erroneous manner in which the "reasonable tendency" test was applied in the Times case. Patterson's editorials charged the Colorado Supreme Court "and certain of its judges, with having been influenced by corrupt motives in their rulings theretofore made in pending causes, and that they would be so influenced in the final disposition of the same. Such articles further charged that such motives would operate

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[31] *Thornhill v. Alabama, supra*, 104.

on the court in its final decision of a pending cause * * * in which no action had as yet been taken by the court."[32]

There is no direct suggestion or implication reasonably to be implied from the Times editorials even remotely approaching the scandalous language appearing in the several editorials involved in the *Patterson case.*

"PROBATION FOR GORILLAS?," like "SIT-STRIKERS CONVICTED," was but the expression of the well-known policy of the Times regarding violence in labor disputes. From the Chandler affidavit it appears that it is established practice to invite opinion in probation matters; that probation officers send out requests for such opinions (R. 52); and that sometime prior thereto, but *following* the granting of an application for probation, the Times had published an article criticising the granting of probation, whereupon the presiding judge of the Superior Court of Los Angeles County advised the Times that its objection should have been made known while the application for probation was pending, rather than subsequent to action taken thereon (R. 52). In the Yoakum affidavit it is pointed out that opinions concerning the propriety of granting probation are attached by the probation officer to his report which he sends to the judge, that the probation officer does likewise with reference to voluntary letters which he receives (R. 53-54), and that in one instance the District Attorney's office wrote a judge respecting the penalty to be imposed on an applicant for probation (R. 54). The California Supreme Court stated that these circumstances had no bear-

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[32] *People v. News-Times Publishing Co.*, 35 Colo. 253, 391.

ing upon the legality of the editorial, declaring that if the Times could publicly comment, some other newspaper could likewise comment, suggesting leniency, and that there would then exist

> "the deplorable situation of a heated newspaper controversy being carried on in the community while the question of probation was before the court for determination. That such a situation would contribute to the orderly administration of justice, we think no one would contend."
>
> (R. 132.)

Whether the existence of such a situation would "contribute to the orderly administration of justice" we believe is open to sincere difference of opinion; but regardless, the suggestion is clearly beside the point. Petitioners were not convicted of failure to contribute to, but for interfering with, the orderly administration of justice. "• • • a State may not unduly suppress free communication of views • • • under the guise of conserving desirable conditions."[33]

The California Supreme Court pointed out that it was proper to communicate with the judge respecting the propriety, or lack thereof, of probation, provided, however, that this were done through the medium of the probation officer (R. 132-133). If the press or an individual should desire to influence a judge, this could be accomplished much more readily by a clandestine approach to the judge through a probation officer than by a frank editorial in public print. An editorial is intended primarily, if not entirely, to advance the opinion of the

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[33] *Cantwell v. Connecticut*, 310 U. S. 296, 308.

editor to his reading public, and to impress upon the public the importance of the matter under discussion.

Finally, although no mention of this appears in the opinion of the California Supreme Court, it should be noted that persons convicted of an assault with a deadly weapon were not, under California law, entitled to probation.[34]

The editorial was further condemned for the reasons stated by the court in its discussion of "SIT-STRIKERS CONVICTED" (R. 133).

Respondent's analysis of "PROBATION FOR GORILLAS?" (Br. Opp. Cert. 21-26) is founded on the unsupported theory that the Times regarded the sentences imposed upon the sit-strikers as light and that it was determined that in the future sentences imposed upon persons convicted in labor disputes should be severe. Neither the record nor the facts support this assertion.

The excerpt quoted by respondent from the *Cantwell decision* (Br. Opp. Cert. 22) has been taken from its context and urged as authority for condemning the reference in "PROBATION FOR GORILLAS?" to the defendants as "gorillas" and "sluggers for pay." The *Cantwell decision* makes clear that resort to epithets or personal abuse directed to the person of the hearer "is not in any proper sense communication of information or opinion safeguarded by the constitution" (310 U. S. 310). The editorial was not directed to the convicted defendants, but

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[34] *Cal. Penal Code*, Sec. 1203: ". . . probation shall not be granted . . . . to a defendant who used or attempted to use a deadly weapon in connection with the perpetration of the crime of which he was convicted . . ."; *In re Sheffield*, 18 Cal. App. (2d) 177, 178.

to the public. It was the expression of the opinion of the Times upon an industrial and social matter of consequence. Its characterization of defendants convicted of assault with a deadly weapon in connection with a labor dispute as "gorillas" or as "sluggers for pay" constituted the publisher's conclusion arrived at upon the facts stated. The conclusion, whether correct or not, would be accepted or not by the readers' attitude or opinion. It did not constitute vilification. If it did, the *Cantwell decision* recognizes that in the discussion of matters of public concern the pleader at times "resorts to exaggeration, to vilification * * *, and even to false statement" (310 U. S. 310), but that in the long view it is better that these excesses be tolerated than that freedom of speech be curtailed.

Concerning "THE FALL OF AN EX-QUEEN" (R. 17), the California Supreme Court said:

> "While the editorial does not refer to the case which was then pending * * * it is hardly conceivable that those in charge of its publication were ignorant of the pendency of said action."
>
> (R. 130.)

This editorial, said the California Supreme Court:

> "would have a disturbing effect upon the judge before whom the case was pending when the time came for pronouncing judgment."
>
> (R. 130.)

The court concluded that the editorial fell within the category of the acts prohibited by authorities previously cited in its opinion (R. 130), namely, *Patterson v. Colorado*, 205 U. S. 454, and *Sinclair v. United States*, 279 U. S. 749 (which was not a free-speech case).

Counsel for respondent quote an excerpt from a statement attributed to an unnamed local trial judge respecting an item he had read in the public press concerning the Werner case. Counsel urge that the state courts would judicially notice this excerpt (Br. Opp. Cert. 15). The doctrine of judicial notice will bear no such interpretation.[35] Again it is a complete answer to point out that the excerpt is not a part of the record; the judge to whom the statement is ascribed was not referring to the editorial "THE FALL OF AN EX-QUEEN," but to published statements of the defendants; the accusation upon which the contempt proceedings were instituted and prosecuted charged that the editorial had an inherent tendency to influence; it did not charge and there was no proof of an actual interference or of knowledge of the editorial by the judge presiding at subsequent proceedings in the Werner case. The California courts adopted the theory of "reasonable tendency" and made no mention of this excerpt not of record. On the contrary, the California Supreme Court conceded that the editorial contained no reference to any pending or contemplated proceeding (R. 130).

In Practical Effect the Judgment Below Forbids the Exercise of Freedom of the Press Respecting Judicial Proceedings.

If these rulings are permitted to stand, no public comment may be made on problems of social, economic or moral consequence involved in court proceedings, even though the proceedings have passed the stage of finality

[35] *Estate of Fulton*, 8 Cal. App. (2d) 423, 425.

following the entry of verdict of a jury or the judgment of a court. The voices of the soap-box orator and radio commentator are stilled, the newspaper presses are stopped,[36] until some indefinite future time—and this irrespective of any clear showing that serious interference with the administration of justice might result.

CONCLUSION.

> "The most dearly prized offspring of our national liberty, is the freedom of the press."
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> *Ex parte Hickey,* 4 Smedes & M. (Miss.), 751, 781.

Not all of the appellate tribunals of the State of California are unmindful of the importance or unaware of the trend of thought and decision respecting the great constitutional right here under consideration. Concerning this right the District Court of Appeal for the Fourth Appellate District lately (June 1938) declared:

> "As we have seen, a secondary boycott peacefully and properly conducted is legal in California under the constitutional guaranty of the right of free speech. It is now too late for us to question such right. In a

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[36] "No difference can be discerned between the rights of the citizen and the proper limitation thereof under his aforesaid constitutional guaranty, whether that citizen be a minister speaking from his pulpit, or a broadcaster through the radio, or an editor through his newspaper, or a curbstone orator from his soap box, or an anarchist from whatever forum he may find for the exploitation of his doctrines . . .

"'. . . what may be spoken may be written, and the converse of the proposition is true that what may not be spoken under such circumstances may not be written.'" (*In re Shuler*, 210 Cal. 377, 402-403.)

> Republic it is necessary that the rights of freedom of speech and freedom of the press be zealously guarded by the courts. Those rights form the life stream of liberty. History teaches us that when those rights are suspended, the right to possess and enjoy private property rapidly vanishes."
>
> *In re Lyons*, 27 Cal. App. (2d) 293, 306.

Recently (April 1940) Mr. Justice White, of the District Court of Appeal, dissenting in *Ex parte Fortenbury*, 101 Pac. (2d) 105 (not officially reported), warned:

> "Let us not alone boast of the priceless heritage that is ours in the constitutional guaranties and liberties we enjoy, but let us as well uphold and defend them. * * * let us remember the salutary words of Thomas Jefferson in his first inaugural address, when he said, ' . . . freedom of religion, freedom of the press, and freedom of person, under the protection of the habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us and guided our step through an age of revolution and reformation. * * * should we wander from them in moments of error or of alarm, let us hasten to retrace our step to regain the road which alone leads to peace, liberty and safety.'"
>
> 101 Pac. (2d) 115.

The highest courts of other states have likewise emphatically stated the importance of and necessity for preservation of freedom of the press:

> "The battles for a free Press are a part of the march of democracy. From complete strangulation by an autocratic monarchy in England in the seven-

teenth century the Press has risen through heroic efforts to occupy a distinguished and necessary place in our form of government. Increased freedom and privileges were secured during the eighteenth and nineteenth centuries from legislatures and courts. As the people became enfranchised, the Press has been made free. In return it has been the duty of the Press to protect the public by bringing the activities and officials of government to the bar of public opinion through the publication of accurate facts and enlightened comment."

State v. American News Co., 64 S. D. 385, ——.

"Any citizen has the right to publish the proceedings and decisions of this court, and if he deem it necessary for the public good, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important public trusts reposed in them, but he has no right to attempt, by defamatory publications, to degrade the tribunal, destroy public confidence in it, and dispose the community to disregard and set at naught its orders, judgments, and decrees."

State v. Morrill, 16 Ark. 384, 403.

Mr. Justice Sutherland, in announcing the unanimous opinion of this court in *Grosjean v. American Press Co.*, 297 U. S. 233, 250, declared:

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of

the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. * * * A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In *Near v. Minnesota,* 283 U. S. 697, this court, quoting James Madison, said:

"'* * * to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; * * *.'"

283 U. S. 718.

During the October Term, 1939, this court on several occasions declared in unmistakably clear language the need for preservation of freedom of speech and of the press:

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."

Schneider v. New Jersey, 308 U. S. 147, 161.

"The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty

of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. * * * A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."

Thornhill v. Alabama, 310 U. S. 88, 97.

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

Id. 101-102.

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been,

or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

Cantwell v. Connecticut, 310 U. S. 296, 310.

This court, in the final opinion delivered by Mr. Justice Cardozo, spoke as follows:

"We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. Twining v. New Jersey, supra, p. 99. This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."

Palko v. Connecticut, 302 U. S. 319, 326-327.

Without the United States there is not today in all the world an exact counterpart of our constitutional guarantee of freedom of speech and of the press. It may be correct to say that the pages of history do not recount an era when the effect of suppression and denial of these rights and liberties has been so manifest. In the United States of America we have not reached a point from which we shall retrace our steps. The judgment of conviction below is a command to halt and look and proceed backward. The opinion of the Supreme Court of California stands alone. In the literature of American decisions there may be found no decision of an appellate tribunal to sustain the judgment below.

The judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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APPENDIX.

Resume of Contempt of Court Decisions Cited by the California Supreme Court in its Opinion in the Bridges or the Times Case.

Bee Publishing Co. v. State, 107 Neb. 74.

Prior to the trial of a criminal proceeding, the newspaper published an article commenting unfavorably on the integrity of witnesses who had appeared before the grand jury and who of necessity would be witnesses at the trial. The article indulged in violent comment and declared the innocence of the accused. Its conviction for contempt of court was affirmed.

Cheadle v. State, 110 Ind. 301.

After a mistrial in a criminal action due to tardiness of the defendant in attending a court session, a newspaper editor published a facetious account of the court proceedings leading up to the mistrial and stating that the trial judge had lost his temper "badly" and had reprimanded the attorneys for the defendant. Subsequently the editor published an article sharply criticising the trial judge for delaying action on the defendant's application for a writ of habeas corpus (the tardy defendant having been imprisoned when apprehended). The conviction for contempt of court was reversed.

Herald-Republican Publishing Co. v. Lewis, 42 Utah 188.

The day following commencement of a murder trial, a newspaper published a resume of the court proceedings

of the opening day of trial, and published a copy of a purported confession of one of the defendants, which purported confession had not been introduced in evidence. The court stated that a publication which "merely tends or is calculated to do so [interfere with judicial proceedings] is not enough" to constitute a contempt—"it must naturally and necessarily have such effect" (42 Utah 202). The contempt of court conviction was reversed.

In re Independent Publishing Co., 240 Fed. 849 (C.C.A. 9).

During the course of a mail fraud prosecution, the only morning newspaper published at the place of trial printed an article stating that the defendant had previously been convicted of embezzlement and was out on parole. The article was read by members of the jury and the court declared a mistrial. The newspaper *did not deny* that the article constituted an interference with the due administration of justice. The conviction for contempt of court was affirmed.

In re Lindsley, 75 Cal. App. 122.

Lindsley was the defendant in a criminal libel action which had been set for trial and the jury panel had already been selected. Thereafter he published in four issues of his newspaper (which circulated at the place of trial and had many subscribers in the county wherein the trial would be held) statements attacking the county District Attorney, impugning his motives respecting his prosecution of the criminal action, and reflecting upon the character and veracity of the prosecuting witness.

Among other things he stated, concerning the prosecuting witness, that he was "a former admitted stool pigeon, and the man who made a perjured expense bill against the county, later stolen from the supervisors' file" (75 Cal. App. 124). The editor was convicted of contempt of court and the appellate court refused to issue habeas corpus.

Nixon v. State, 207 Ind. 426.

A newspaper article severely criticised a trial judge for the appointment of a particular person as receiver. The criticism appeared subsequent to the time of the appointment, but during the pendency of the receivership proceeding. The conviction for contempt of court was reversed.

Patterson v. Colorado, 205 U. S. 454.

Resume appears in brief, ante p. 28.

People v. Wilson, 64 Ill. 195.

During the pendency of an appeal to the Supreme Court in Illinois of a person convicted of murder, a newspaper published an article stating that money raised for the appeal was "operating splendidly"; prophesying that the conviction would be reversed and asserting that $1,400.00 "is enough nowadays to enable a man to purchase immunity from the consequences of any crime," and that "the courts are now completely in control of corrupt and mercenary shysters—the jackals of the legal profession." The Supreme Court of Illinois issued a contempt citation to the editor of the paper and by a four-to-three decision held him in contempt of court.

In re San Francisco Chronicle, 1 Cal. (2d) 630.

The Supreme Court of California issued a contempt citation and prosecuted and convicted the editor of a newspaper of contempt of court for publishing an article purporting to disclose the judgment of the Supreme Court reversing a judgment of conviction below in a capital case which was then pending before it and as to which no judgment or opinion had been made public. The effect of the article would lead the readers of the newspaper to believe that the paper had a secret means of obtaining, in advance of their publication, decisions of the California Supreme Court.

In re Shortridge, 99 Cal. 526.

Shortridge was convicted of contempt of court for publishing an article containing excerpts from evidence "of a filthy nature" adduced during a divorce trial. The Supreme Court of California annulled his conviction, stating that there was no "real danger" (99 Cal. 534) that the publication of the evidence would deter timid or sensitive witnesses from testifying to the truth.

In re Shuler, 210 Cal. 377.

Reverend Shuler was convicted of contempt of court for uttering a series of radio addresses assailing the motives and impugning the integrity of the judges of the Superior Court of Los Angeles County with respect to certain cases then pending before them. The California Supreme Court denied his petition for habeas corpus.

Sinclair v. United States, 279 U. S. 749.

The defendant in a pending criminal trial caused the jurors, their families and friends to be shadowed and investigated. This circumstance contributed to an entry of a mistrial in the criminal proceeding. The conviction for contempt of court was affirmed by this court.

State v. Circuit Court, 97 Wis. 1.

During a judicial election campaign, violent strictures assailing the integrity of the incumbent judge (also a candidate for reelection) were written and published by a rival candidate and an opposition newspaper. The incumbent judge sought to punish for contempt and the Supreme Court issued an alternative writ of prohibition which thereafter was made absolute, the court holding that such comment did not constitute a contempt of court.

State v. Howell, 80 Conn. 668.

Shortly prior to and during the course of a jury trial, a community newspaper published articles summing up the evidence which would be introduced, commenting thereon, and reflecting upon the parties and expressing an opinion on the merits. Its conviction for contempt of court was affirmed.

State v. Lovell, 117 Neb. 710.

During the pendency of a civil appeal before the Supreme Court of Nebraska, defendant published a newspaper article wherein he prophesied that the case would be affirmed; he mentioned gossip to the effect that there was a certain person who believed that interests friendly

to the appellants were in a position to influence the judges of the Supreme Court and that the unnamed person offered to bet that the judgment would be reversed. The article defended the integrity of the judges but suggested that the confidence of the public in the judiciary would be enhanced if the decision were rendered prior to the coming general election. The Supreme Court cited the editor and held him guilty of contempt of court and imposed a jail sentence.

State v. New Mexican Printing Co., 25 New Mex. 102.

During the pendency of civil and criminal libel actions against the New Mexican Printing Co., it published an article stating that the suits were political in their nature and that the trial judge was a strong supporter of the political boss in control of the county wherein the causes were pending. The conviction of contempt of court was reversed.

State v. Tugwell, 19 Wash. 238.

Shortly after the rendition of a decision by the Supreme Court of Washington (but prior to expiration of the time within which a petition for rehearing might have been acted upon), an editor published comment bitterly criticising the decision and vigorously impugning the integrity of at least one of the members of the court. The Supreme Court of Washington held that the publication was a contempt of court.

Matter of Sturoc, 48 N. H. 428.

Sturoc, a lawyer, caused to be published in a newspaper circulated in a small town where a criminal prosecution was pending, while the court was in session and during the term in which it would likely try the proceeding, an article severely criticising the prosecution and using abusive terms. The conviction for contempt of court was affirmed.

Tate v. State, 132 Tenn. 131.

During the course of a jury trial in a will contest, the editor of a newspaper caused to be published an article referring to "mysterious affidavits" offered in evidence, but rejected by the trial court, in the absence of the jury. The conviction of the editor for contempt of court was affirmed.

Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294.

Pending a jury trial in an action to recover damages for taking of property by a public body, a newspaper published that the public body had offered the plaintiff $80.00 damages at the time it took his property, but that plaintiff demanded $250.00, and, not getting it, "went to law." The conviction of the newspaper for contempt of court was affirmed.

Toledo Newspaper Co. v. United States, 247 U. S. 402.

Resume appears in brief, ante, p. 14.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 64

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the Supreme Court of California

REPLY BRIEF OF PETITIONERS.

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On Writ of Certiorari to the Supreme Court of California

REPLY BRIEF OF PETITIONERS.

In reply* to Supplemental Brief on Behalf of Respondent, petitioners respectfully submit:

The questions presented are misunderstood and incorrectly stated by respondent.

At pages 4 and 5 of our Petition, and at page 8 of our Brief, appear statements of the question presented. Re-

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* Italics ours unless otherwise noted.

spondent fails to understand, and accordingly does not correctly state, the question at pages 1 and 2 of the Supplemental Brief.

The Federal question involved is not as respondent suggests:

> Was the proper test applied?

but is as petitioners suggest:

> Applying the proper test, do the facts warrant an abridgment of the right asserted?

Upon an incorrect understanding and statement of the question, respondent advances its fifth contention (Supp. Br. pp. 49, *et seq.*), to the effect that the evidence may not be reviewed in this Court. Respondent's position simply stated (Supp. Br. pp. 49 to 52) is this:

> If the reasonable tendency test applied by the State Supreme Court is the correct test, no Federal question is involved because this Court is without authority to weigh "the sufficiency of the evidence to sustain the conviction" (Supp. Br. p. 49).

Where one asserts a constitutional right guaranteed under the First and Fourteenth Amendments, and the State court decides against the right as claimed, this Court does not stop with a determination that the correct test has been applied. The sufficiency of the evidence is considered. The rule was recently stated by this Court in *Norris* v. *Alabama*, 294 U. S. 587, 589-590:

> "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied

> in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights."

This rule has been frequently announced.*

Respondent's confusion is disclosed in the Supplemental Brief (p. 52) where it is declared that a determination of the proper standard accords due process within the meaning of the constitutional provision. The language used is:

> "If due process has been denied petitioners, it is because of failure to apply the proper legal standard to the evidence, not because of the determination of the proper factual inferences to be drawn from that evidence."

This is tantamount to declaring that in a state where the clear and present danger doctrine prevails and is applied, one cited for constructive contempt by publication, and found guilty over his protest that his utterance is protected under the First and Fourteenth Amendments to the Federal constitution, would not be heard to complain in this Court despite the entire absence of evidence to sustain the finding of clear and present danger.

Additional indication that respondent has confused the question of correct test with the question of abridgment of liberty of free press appears from a statement in the Supplemental Brief (p. 17) where, after a review of early English authorities, the Patterson and Toledo Newspaper Company cases and the Bridges case, respondent suggests

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* *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 420; *Abrams* v. *United States*, 250 U. S. 616, 619; *Fiske* v. *Kansas*, 274 U. S. 380, 385-386; *Pierre* v. *Louisiana*, 306 U. S. 354, 358.

that some overwhelming reason should be advanced for departing from the reasonable tendency rule and declares:

> "Indeed, they should be able to furnish an affirmative answer to the query whether their 'present danger' doctrine,
>
> 'Is * * * a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?' (*Twining* v. *New Jersey*, 211 U. S. at 106)."

Petitioners have not contended, and have not observed in the opinions of this Court any declarations that the clear and present danger doctrine "is a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government". The fundamental principle of liberty and justice here involved is freedom of speech and of the press. This we understand to be an inalienable right—one that inheres in the very idea of free government. This is a right, as we understand, so fundamental that if sacrificed "neither liberty nor justice would exist." (*Palko* v. *Connecticut*, 302 U. S. 319 at 326, 327.) Whether this fundamental principle of liberty and justice has been sacrificed "requires an examination of evidence".* Prior to an examination of the evidence the court must determine by what test it will examine the evidence. Whether it be the reasonable tendency adopted by the California courts, the dangerous tendency rejected in *Herndon* v. *Lowry***, the "requisite reasonable tendency" advocated by respondent (Supp. Br. p. 42), the clear and present danger doctrine frequently announced by this Court, or the actual obstruction principle advocated by some students of the problem,

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* *Norris* v. *Alabama*, 294 U. S. 587, 589, 590.

** 301 U. S. 242 at 256, 261.

its subsequent application to the record facts is necessary to enable the Court to determine whether or not the constitutional right of free speech or of free press has been abridged.

Does respondent contend that reasonable tendency test and clear and present danger doctrine are identical?

Petitioners are unable to determine whether respondent contends that the reasonable tendency test properly construed meets the requirements of the clear and present danger doctrine. In Brief of Respondent, page 42, the respondent declares:

> "The doctrine, [clear and present] as advanced by petitioners, is not essentially different from the reasonable tendency rule."

In discussing this topical heading respondent states:

> "Under this statement of the rule there is necessary to lawful restraint of speech only 'a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent.' And petitioners (at p. 18) concede that 'danger to the orderly administration of justice,' if clear and imminent, would measure up to the standard which they advocate."
>
> (Br. of Resp. p. 43.)

The subheading concludes with this statement:

> All counsel who advocate the danger doctrine find difficulty in formulating it so as to exclude 'tendency to influence' as the essential element."
>
> (Br. of Resp. p. 44.)

An element, and even an essential element, implies the necessity for other and additional elements. A part, no matter how essential, is not the whole. It may well be that

facts having a tendency to influence are an essential element of the clear and present danger doctrine.

In supplemental Brief of Respondent it appears that respondent has gone a long way toward admitting, if it has not actually admitted, that the clear and present danger doctrine is the proper test. At page 18 of Supplemental Brief respondent sets forth this subheading:

> "The Danger Doctrine is Not Essentially Different From the Reasonable Tendency Rule."

The first statement under this heading reads:

> "We showed in our former brief that the doctrines are essentially one (pp. 42-47); * * * and that each test presents in its application a question of fact depending for solution upon determining a matter of *degree* (pp. 44-47)—*degree of tendency* to interfere or of danger of interference."

Referring to the opinion of Mr. Justice Holmes in the *Schenck* case* respondent's Supplemental Brief (p. 20) states:

> "Explaining that 'it is a question of proximity and degree' the learned jurist found that the tendency of the document *was enough* to meet the danger test and in that connection specifically rejected the actual obstruction criterion."

This subsection of the Supplemental Brief (p. 23) concludes with this statement:

> "None of the later cases** throws any doubt upon the *substantial identity* of the reasonable tendency and the present danger tests."

---

* 249 U. S. 52.

** *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Pierce* v. *United States*, 252 U. S. 239; *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357.

Finally, in the Supplemental Brief, respondent imposes upon the reasonable tendency test a qualification or requisite that appears to indicate that the conception of reasonable tendency as entertained by respondent requires the degree of proof or degree of tendency encompassed within the clear and present danger doctrine.

Respondent states (Supp. Br. pp. 41-42):

> "The Los Angeles Times, through its localized circulation, lacks potentiality to interfere with the deliberations of the Supreme Court of the United States. And while an issue of the San Francisco Chronicle possesses sufficient momentum to reach the Supreme Court in San Francisco (1 Cal. (2d) 630), the same article, appearing in an inconspicuous country newspaper, would not have had the *requisite* reasonable tendency to disrupt the judicial calm. * * * Though relating to a different stage of the same cause, the question of reasonable tendency must be solved with reference to the *nature and place* of the utterance and its inherent momentum."

This concept of reasonable tendency, if it does not proceed all the way to the clear and present danger doctrine, approaches it so closely that it is not difficult to understand respondent's contention:

> "The danger doctrine is not essentially different from the reasonable tendency rule." (Supp. Br. p. 18.)

Respondent speaks of "the *requisite* reasonable tendency to disrupt the judicial calm" (Supp. Br. p. 42). "Requisite" in the ordinary acceptation of the term means necessary, indispensable, essential. Respondent also declares:

> "the question of reasonable tendency must be solved with reference to the *nature and place* of the utterance and its *inherent momentum.*" (Supp. Br. p. 42.)

Certainly this is a close approximation to the clear and present danger doctrine. It is an interpretation of the reasonable tendency doctrine by respondent which so construed justified its statement that it "is not essentially different from" the clear and present danger doctrine, which we here state:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."*

The California courts, however, in the *Times* and *Bridges* cases, drew a well-defined line of distinction between the reasonable tendency rule and the clear and present danger doctrine. They specifically rejected the clear and present danger doctrine.** In the Brief of Respondent in Opposition to Petition for Writ of Certiorari (p. 42) respondent quotes from the opinion of the trial court to the effect that the clear and present danger doctrine has no application to contempt proceedings, and quoting the reason for such conclusion. In respondent's Supplemental Brief (p. 28) the same contention is again advanced under the topic heading:

> "As Now Defined by This Court the Present Danger Doctrine is Inherently Inapplicable to Contempt."

If, as respondent contends (Supp. Br. p. 18)

> "The danger doctrine is not essentially different from the reasonable tendency rule"

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* *Schenck* v. *United States*, 249 U. S. 47 at 52; *Herndon* v. *Lowry*, 301 U. S. 242 at 256.

** Times Trans. of Record, pp. 105-106, 122; Bridges Trans. of Record, p. 158.

and if, as respondent contends (Supp. Br. p. 28)

> "As now defined by this court the present danger doctrine is inherently inapplicable to contempt"

a confusing situation would result. Upon oral argument respondent may clarify this situation.

Subjective and Objective Consideration.

Respondent correctly understands our contention that the "clear and present danger" test is objective, the "reasonable tendency" test subjective. It declares:

> "Counsel apparently mean that the judge, in the one case, reaches his conclusion upon a consideration of proved facts and, in the other, draws it out of his own consciousness."
>
> (Supp. Br. p. 23.)

And

> "Quite obviously the rule does not permit of any 'presumed tendency', such as petitioners suggest."
>
> (Supp. Br. p. 23.)

The California Supreme Court nevertheless relied almost exclusively if not entirely upon presumed tendencies for justification of its decision; e.g. in a consideration of the editorial "Sit-Strikers Convicted" it held:

> "These expressions of approval of the verdict and condemnation of the convicted defendants made by such an influential paper as the Los Angeles Times on the day just preceding the day fixed by the court for pronouncing sentence *could not help having* an effect upon the trial judge, * * *. It cannot reasonably be said that they *would have no tendency* to influence the trial judge * * *. The editorial may not have been intended, but it is *capable of being construed*, as a notice

> to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that should the court act contrary to the suggestions contained in the editorial, *it might well expect* adverse criticism in the columns of The Times. Viewing the editorial in the light of *these considerations,* we are satisfied that its reasonable tendency was to interfere * * *." (R. 128.)

Continuing its argument, respondent (Supp. Br. pp. 24-25) asserts that petitioners' counsel are somewhat inconsistent in invoking considerations of fact in discussing the sufficiency of the evidence to support the conviction. These considerations of fact for the most part appearing in the Chandler affidavit, admitted in the opinion of the Supreme Court to be true (R. 134) were overcome (so the California Supreme Court held) by the subjective inferences of the trial judge. Our statement is supported by the following declaration of the State Supreme Court:

> "From the facts set forth in said affidavit it is contended that the position of the Los Angeles Times was so well known in the City of Los Angeles * * * including the members of the judiciary of said county, that the superior judges before whom the two actions were pending would not be influenced nor would either of the defendants in either of said actions be prejudiced to any extent * * *. The weight to be given to this evidence was solely a matter resting with the trial court * * *. The affidavit of Mr. Chandler did no more than cause a *conflict in the evidence* which the trial court resolved against petitioner" (R. 134).

There is no conflict in the evidence on any material fact. We have attempted to draw from respondent a contradiction of this statement. In Petitioners' Brief (pp. 24, 25) we emphasize by unqualified direct statement the absence of any conflict in the evidence and the circumstance that "Despite the uncontradicted facts of the affidavit which the

Supreme Court declares are true (R. 134) the trial court nevertheless considering the editorial subjectively—i.e., independent of the record—concluded otherwise. This conclusion of the trial court the Supreme Court says created a conflict in the evidence (R. 134)." In the Supplemental Brief of respondent our contention is not mentioned. Respondent avoids this issue and by so doing, impliedly at least, admits the correctness of our statement. If there had been a conflict in the evidence, respondent would not have overlooked it. Under point IV of the Supplemental Brief (p. 44) such conflict would have been scheduled and cited in support of the contention that no Federal question is presented and that the writ should be dismissed. Under point V (p. 49), where it is declared "The sufficiency of the evidence to sustain the conviction is not open to review here," the conflict of evidence would have been stressed, but we find no mention of conflicting evidence. The only conflict is between the facts of the affidavit accepted as true, and the inferences or conclusions arrived at by the trial judge from a subjective or introspective consideration of the reasonable tendency of the editorials.

The absence of any conflict in the record is well illustrated by the following statement from the dissenting opinion of Chief Justice Gibson:

> "The Times is charged with obstructing justice and interfering with a pending judicial proceeding, and there is no evidence whatever of such obstruction or interference." (R. 146).

There was no finding of successful obstruction of pending causes.

Concluding its distinction of objective and subjective consideration, respondent states (Supp. Br. p. 27):

> "The Supreme Court's discussion of the various editorials shows that all of petitioners' constituents of an

> 'objective conclusion' were considered by it and the actual result was a *finding* that there had been such successful obstruction of the pending causes that 'the detriment caused by the publication of said editorials was *the probable denial of a fair trial** to the litigants in the actions then pending before the courts which were the subject of said editorials."

There is no "finding that there had been such successful obstruction of the pending causes". Findings in their entirety appear in the record, pages 60 and 61, and 88. Respondent evidently refers to the conclusion of the Supreme Court arrived at by processes of assumption that the result of the editorials "was the probable denial of a fair trial" (R. 138).

There has been no "virtual confession of guilt upon the count relating to 'Probation for Gorillas?'"

This contention ("virtual confession of guilt*") was advanced by respondent in its Brief in Opposition to Petition for Writ of Certiorari (pp. 5-7). The utter lack of support in the record for the contention, together with the grave importance of a question before the Supreme Court of the United States involving an interpretation of the constitutional right of freedom of speech and of the press when thought to conflict with the necessity for maintaining the independence, integrity and impartiality of the courts, caused us to pass the claim unnoticed. In the Supplemental Brief of Respondent the contention is again advanced (Supp. Br. p. 27). An excerpt from the statement of counsel for petitioners made at the close of the hearing in the trial court is quoted in part only. In fact, the quotation begins in the middle of a sentence and accordingly fails to express the entire thought. The statements of counsel for

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* Italics are respondent's.

the petitioners appearing at pages 71, 86 and 87 of the Transcript of Record made certain that the petitioners and their counsel throughout entertained the honest conviction that they were exercising and attempting to defend a constitutional right well within any legal limitation thereon. If any such confession as respondent now asserts had been made it is interesting to note that neither the California trial nor appellate tribunals observed it.

A serious defense was made of each of the editorials.

Respondent, under its sixth point (Supp. Br. p. 61), respecting the editorial "Probation for Gorillas?" cites from the opinion of the state court:

> "'But little is said, or can be said, in defense of the publication of this editorial' (R. 131), and that:
> '* * * petitioner, The Times-Mirror Company, advances no serious defense of its publication of said editorial in so far as the character and nature of the editorial are involved * * *.' (R. 131.)"

Our briefs before the Supreme Court of the State of California are no part of the record before this Court, and we are without authority to make any reference to their contents. A reference, however, to the Opinion of the Supreme Court of California, which is a part of the Transcript of Record, will disclose (R. 131 to 134) that the defenses to this editorial were more numerous than to either of the other two. The defenses to this editorial embraced all the defenses to the other editorials, and in addition, involved the defense relating to probation matters and also required a more extended consideration by the Supreme Court of California of the facts than was given by that court to a consideration of either of the other editorials.

The statement of the State court that petitioner "advances no serious defense" concededly expresses the view

of the State's highest judicial tribunal. If there was no serious defense advanced to this editorial, there was no serious defense advanced to either of the other two. We had always considered, however, that the contention that the convictions unlawfully abridged the right of freedom of speech and of the press guaranteed by the Federal Constitution was a serious defense. The granting of the writ of certiorari by this Court confirms our opinion.

The present danger doctrine is not inherently inapplicable to contempt.

The trial judge, to whose opinion respondent so frequently refers and from which respondent frequently quotes, declared that the clear and present danger doctrine as applied to constructive contempt proceedings would result absurdly because one or more contempts would be passed by as unimportant and the court would be unable to act until "so many contempts had been committed that the courts and the Government would have been undermined, by which time there would have been so great a popular uprising as to change the form of government, whereupon there would be no courts and therefore no contempt" (R. 106). Respondent embraced this doctrine and in its Brief in Opposition to the Petition for Writ of Certiorari (p. 42) quoted at length from the opinion. Respondent now (Supp. Br. p. 28) appears to have abandoned the trial court's reasoning and conclusion and adopted petitioner's statement or confession, as respondent is pleased to term it (Supp. Br. p. 28) that "interference with one judge or one judicial proceeding" is a "substantive evil which the State constitutionally may seek to prevent" and hence "within the allowable area of State control." Respondent now apparently considers that the reason assigned by the

trial court for declaring the present danger doctrine inherently inapplicable to contempt proceedings is not persuasive.

Respondent then considers what it terms "the rationale of the *Thornhill* decision" and declares that it "forbids application of this standard [present danger] to contempt of court * * *" (Supp. Br. p. 28). From the opinion of the *Thornhill* case * respondent quotes:

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" (Supp. Br. p. 30).

The "Sit-Strikers Convicted" editorial read in the light of the exigencies of that date as disclosed by the Chandler affidavit, the facts of which were stipulated to be true (R. 134), is within the scope of the thought expressed in the sentence just quoted from the Thornhill opinion. Respondent contends, however, that "freedom of discussion" as defined in the Thornhill opinion is satisfied "as to pending litigation, by discussion after the ruling is made, by the right of recall, or refusal to reelect" (Supp. Br. p. 31). The "right of recall" or "refusal to reelect" are not substitutes and neither is a substitute for the fundamental right of free speech or a free press. In many states there is no right of recall of judicial officers. In others many judicial officers are appointed. Regardless of this, we contend that in no opinion of a court of record that we have found on the subject is there an intimation that the fundamental rights guaranteed by the First and Fourteenth Amendments to the Federal Constitution may be annulled or abridged by a statutory right analogous

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* 310 U. S. 88.

to the right of recall or the right to exercise the elective franchise.

Respondent continues:

> "It should be remembered that discussion is not necessarily deferred until the entire cause is ended; that it is improper only as to *pending matters*" (citing the *Shuler* case, 210 Cal. at 387). (Supp. Br. p. 31.)

Why respondent did not cite the opinion of the State Court in the *Times* case is interesting to contemplate. There the California Supreme Court declared that comment in criminal cases was not permissible with reference to a verdict of guilty after it had been returned and entered. The opinion reads:

> "It cannot be successfully contended that the verdict was decisive of the case or was a final determination of the fate of the defendants" (R. 125).

Respondent's statement that comment "is improper only as to pending matters" involves an interpretation of the term "pending."

In the editorial "Sit-Strikers Convicted" the comment, so far as it related to the criminal proceeding, commented upon a verdict which had been entered. That was not a pending matter. A motion for a new trial was not pending; neither was an application for probation (R. 10). There was no comment upon the passing of sentence if it be considered a pending matter.

In the editorial "The Fall of an Ex-Queen" the verdict had been returned and entered. The editorial made no reference to the case. The Supreme Court of California admits as much (R. 130). The record discloses that a motion for new trial was pending (R. 17). The editorial, however, makes no reference to the motion for new trial nor to any other pending matter.

In the editorial "Probation for Gorillas?" there was a direct reference to a pending matter, namely, the application for probation (R. 23). That such reference did not constitute an unlawful exercise of the right of a free press has been the thesis of our briefs and argument.

Petitioners seek no special immunity, only equal protection of the laws.

Respondent believes that petitioners seek special immunity and not the equal protection of the laws (Supp. Br. pp. 42-43). Such is not the petitioners' purpose. We ask only the same consideration as was accorded the humble petitioners in the several cases beginning with *Fiske* v. *Kansas* and terminating with *Cantwell* v. *Connecticut*. In each instance rights accorded under the First and Fourteenth Amendments to the Federal Constitution were not fully recognized by the courts of the several States.

Facts or contentions *dehors* the record do not influence the court.

In the Supplemental Brief of respondent (pp. 53 to 60) appears much matter *dehors* the record. It consists of extended quotations from Respondent's Brief before the Supreme Court of California (Supp. Br. pp. 53, 56 to 60, inc.), statements of fact relating to efforts of the Bar Association Committee (Supp. Br. p. 59, footnote), and statements of other facts said to be well known in the locality (Supp. Br. pp. 53-54). These matters *dehors* the record are not alone entirely lacking in persuasiveness of a correct determination of the problem here imposed upon this Court, but, pursuant to the elementary rule which this Court on a few occasions has found necessary to announce, do not in any degree influence the court's determination of the case.*

* *Schley* v. *Pullman Car Co.*, 120 U. S. 575, 578; *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 796; *Hussman* v. *Durham*, 165 U. S. 144, 150.

Herndon v. _Lowry_ supports petitioners' contention.

Respondent, declaring the contrary of the thought expressed in the preceding headnote, states:

> "None of the cases so far decided rejects 'reasonable tendency' to accomplish a harmful result where that test has been prescribed by the legislature." (Supp. Br. p. 35.)

The most recent statement on the subject is found in *Cantwell v. Connecticut*, 310 U. S. 296 at 307, 308, where it was held:

> "Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations."

However, the point of respondent's contention is not apparent when it is recalled that the California Legislature in its declaration of policy upon this subject has specifically prohibited summary prosecutions for constructive contempt by publication, that the petitioners relied upon this statute, and that the Supreme Court of California in the majority opinion held the statute unconstitutional.*

Comparative certainty of the tendency and danger tests.

Under this heading respondent (Supp. Br. p. 38) argues that the circumstance that there have been dissenting opinions in the cases there cited is proof that the clear and present danger test is not more certain than the reasonable tendency test. We had considered that the case of *Herndon v. Lowry* is the first instance where this Court was compelled to choose between the tendency test and the clear and present danger doctrine. In the Herndon case the tendency

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* R. 121; cf. *Bridges* v. *Superior Court*, 14 Cal. (2d) 464, 479, *et seq.*

test was designated the "dangerous tendency" (301 U. S. at 256). We appreciate of course that the rule was specifically announced in the opinion of Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47 at 52. Until *Herndon* v. *Lowry*, however, we understand the decision of the lower court was not reversed because of a failure to apply the clear and present danger doctrine. It is observed that Justices Van Devanter and McReynolds, concurring in *Schenck* v. *United States* dissented in *Herndon* v. *Lowry*. This circumstance causes us to believe that Justices Van Devanter and McReynolds in concurring in *Schenck* v. *United States*, where the judgment below was affirmed, did not feel that they were committed to the clear and present danger doctrine. Again in *Abrams* v. *United States*, 250 U. S. 616, in *Schaefer* v. *United States*, 251 U. S. 466, in *Pierce* v. *United States*, 252 U. S. 239, in *Gilbert* v. *Minnesota*, 254 U. S. 325 and in *Gitlow* v. *New York*, 268 U. S. 652, referred to by petitioners (Supp. Br. p. 38), the judgments of conviction below were in each instance affirmed and the justices dissenting, viz., Justice Holmes and Justice Brandeis, were exponents of and advocated the clear and present danger doctrine. Conscious that we may be in error in our conclusion, and realizing that respondent has positively so declared (Supp. Br. p. 17, footnote 18), we yet entertain the belief that not until the decision of *Herndon* v. *Lowry* did the court by a majority opinion, where the question was necessary to the decision, embrace the clear and present danger doctrine and reject the tendency or dangerous tendency test. Subsequent to the decision in *Herndon* v. *Lowry*, unanimity of opinion has resulted from the application of the clear and present danger doctrine. Mr. Justice McReynolds alone dissented (each time without an opinion) in *Schneider* v. *State*, 308 U. S. 147, *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *State of California*, 310 U. S. 106, but concurred in the unanimous opinion of the court in the

recent case of *Cantwell* v. *Connecticut*, 310 U. S. 296. The history of decision in the Supreme Court of the United States involving the application of the clear and present danger test we respectfully submit has resulted in unanimity of opinion and not in uniform disagreement and dissent as respondent contends.

CONCLUSION.

For the reasons assigned in the petitioners' briefs, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 3

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITIONERS' BRIEF ON REARGUMENT

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Additional argument based largely upon decisions of this court, announced immediately preceding and subsequent to oral argument during 1940 Term, may be of assistance in a further consideration of this case.*

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*Italics are ours unless otherwise noted.

History of the Proceedings.

Petitioner The Times-Mirror Company publishes the Los Angeles Times, a daily newspaper of general circulation in Los Angeles County. Petitioner Hotchkiss is its Managing Editor.

Two citations for contempt were issued by respondent court upon application of a committee from one of three Los Angeles associations of attorneys. No judge or other public official joined in instituting or prosecuting the proceedings. Over petitioners' protests the committee of private attorneys prosecuted the proceedings to judgment. The citations required petitioners to show cause why they should not be held in contempt of court for the publication of seven editorials published over a period of six months. The proceedings were summary and in violation of the state statute prohibiting summary prosecution for constructive contempt by publication. Judgments of conviction were pronounced on five of the seven editorials. In the trial and appellate courts petitioners relied upon the First and Fourteenth Amendments guaranteeing free speech and a free press. The cause is here upon certiorari and involves consideration of a judgment abridging freedom of the press on the asserted ground that its exercise in three instances has actually interfered with the orderly administration of justice.

Summary Proceedings Emphasized.

We emphasize the circumstance that in violation of the state statute, petitioners were prosecuted summarily and convicted of crimes punishable by imprisonment, not because prosecution by a group of private attorneys, the denial of a jury trial, and the disregard for the legislative declaration of state policy present a federal question, but because

this court of recent date has announced its grave concern when "the vital individual freedoms guaranteed by the First Amendment" are "partially whittled away" by the courts "acting without a jury in the exercise of its broad power to punish for contempt."[1]

In the *Nye case* (4/14/41) this court stated it would meticulously observe the separate categories of contempts enumerated in the federal statute

> "* * * so that the instances where there is no right to jury trial will be narrowly restricted."[2]

In a dissenting opinion in the *Meadowmoor Dairies, Inc. case,* the question before the court was stated:

> "To what extent will the layman who might wish to write about or discuss the prohibited subjects feel that he cannot do so without subjecting himself to the possibility of a *jail sentence under a summary punishment for contempt?*"[3]

The Three Editorials Here Under Consideration.

They are three: *First,* an editorial entitled "SIT-STRIKERS CONVICTED", published approximately *six months* preceding the contempt citation; *Second,* an editorial entitled "THE FALL OF AN EX-QUEEN", published approximately *seven weeks* preceding the citation, and, *Third,* an editorial entitled "PROBATION FOR GORILLAS?", published *one month* preceding the citation.

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[1] *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, at 302 and 309 (dissenting opinion of Mr. Justice Black).

[2] *Nye v. United States*, 313 U. S. 33, at 49.

[3] 312 U. S. at 308.

1. "SIT-STRIKERS CONVICTED" SYNOPSIS AND ANALYSIS.

The editorial "SIT-STRIKERS CONVICTED" (R. 11) was published the day following a jury verdict of guilty against twenty-two defendants charged with a felony. The defendants and many others had previously conducted a sit-down strike at the Douglas airplane plant, in Los Angeles County. The editorial declared that the verdict would have reverberations up and down the Pacific Coast; that the City of Los Angeles is aroused to the danger of "davebeckism": that the verdict may have a good deal to do with sending Dave Beck back to Seattle, and if Beck can be convinced that this kind of warfare is not permitted in Los Angeles, he will abandon his dreams of conquest; that the farmers have given Beck a setback; it has been made plain that interference with milk deliveries will not be tolerated; the District Attorney in a radio address pledged his best efforts to prevent and punish union terrorism and racketeering, and later made a statement congratulating the jury and the community on one of the "most far-reaching verdicts in the history of this country."

The editorial then declares:

> "In this he is correct. It is an important verdict. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime."

That such seizure of property is within the control of local authorities; that government may have broken down in other localities but Los Angeles County stood firm, its officers did their duty, and the courts and juries functioned, and so long as this condition prevails "davebeckism will not get control nor johnlewisism either."

As we interpret it, the plain purport of the editorial is

that "davebeckism" shall not prevail in Los Angeles. The Dave Beck industrial philosophy is condemned. Law enforcement is approved. Eliminating Dave Beck and John Lewis, the individual or personal equation is entirely absent. A principle is advocated.

The editorial is directed mainly and unfavorably at "davebeckism" and the "sit-down strike", and favorably at law enforcement agencies and, what it calls, "an important verdict."

This editorial was published December 21, 1937. Fourteen months later, February 27, 1939, this court announced that the sit-down strike, accompanied by seizure of the employer's property, was a "high-handed proceeding without shadow of legal right."[4]

Background of Record Facts to Which the Editorials Related.

To appraise accurately the meaning and effect of these editorials, it is necessary, as stated by Mr. Justice Brandeis in *Schaefer* v. *United States*,[5] to consider local conditions, attitudes and practices which may enlarge or otherwise control their meaning or which may show that they were circulated under circumstances which gave them peculiar significance or effect.

Concerning Dave Beck.

It is admitted that Dave Beck, referred to six times in one editorial and three times in another, is the labor boss of Seattle (R. 48), and virtual political and industrial dictator of Puget Sound territory; that he had closed highways and industries, halted import of raw materials, stopped deliv-

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[4] *NLRB* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, at 252.

[5] 251 U. S. 466, at 483-484.

eries to consumers, forced organization of, and payment of tribute by, service industries delivering foods, fuel and household necessities; that Beck endeavored to extend his domination to Portland where, opposed by the authorities, his lieutenants were indicted and pleaded guilty to acts of assault, arson and bombing.

Beck Threat to Los Angeles Industrial Area.

That Beck had frequently threatened to bring the Los Angeles industrial area under his control; that in February, 1937, Mayor Dore of Seattle, a supporter of Beck, declared in Los Angeles, publicly, that Dave Beck's political party had made Seattle one hundred per cent union, and the same would be true in Los Angeles; following this and similar statements, *the Los Angeles Times published a series of front-page articles* entitled "Progress in the Northwest"; these articles commenced about two months prior and ended one week subsequent to the publication of the Sit-Strikers Editorial; each article described some phase of business in the Beck dominated area and the manner in which industries suffered therefrom; these articles "were published for the purpose of informing Times readers of what might be expected should the threat of 'davebeckism' become a reality in" the Los Angeles area (R. 50).

Policy of The Times on the Use of Violence in Labor Disputes.

It was stipulated to be true (R. 134) that for fifty years the Los Angeles Times has done everything within its power to maintain the open-shop principle in Southern California; that because of *many hundreds* of editorials published by it, the Times has become thoroughly identified in the public mind with the open-shop policy; that it has become the leader of community thought on the subject.

That numerous efforts have been made to dislodge the open-shop system in the industries of Los Angeles. Many have been accompanied by violence ranging from felonious assaults to dynamiting of open-shop establishments (Los Angeles Times plant) accompanied by loss of life.

> "These activities have been factually reported in the news columns of The Times, and their illegal * * * character *editorially pointed out and commented upon.*" (R. 45)

> "Throughout the period of sit-down strikes (stated in detail [R. 45-47]) The Times *commented on them frequently and vigorously*, taking the position that such efforts constituted illegal * * * seizure * * * of private property * *. *It applauded the action* of authorities here and elsewhere so to deal with them * * *." (R. 47)

As Analyzed by State Supreme Court.

The state Supreme Court analyzed the editorial ("SIT-STRIKERS CONVICTED") in the following language (R. 127):

> "The editorial entitled, 'Sit-Strikers Convicted' unquestionably approved the jury's verdict. It praises the jury for its rendition, and the court in which the action was pending. It discussed the importance of the verdict and its effect upon the industrial strife then being waged in and beyond the limits of the City of Los Angeles. Its reference to 'union terrorism and racketeering' can only be construed as implying that the convicted defendants in the pending action were engaged in such activities. These *expressions* of approval of the verdict and *condemnation of the convicted defendants* made by such an influential paper as the Los Angeles Times on the *day just preceding the day fixed by the court* for pronouncing sentence could not help having an effect upon the trial judge, who, as we have seen, was clothed with a wide discretion in fixing the punishment of the

convicted defendants, to say nothing respecting his duties *in case* a motion for a new trial was made or an application for probation was presented to him. It cannot reasonably be said that they *would have no tendency to influence* the trial judge in rendering the judgment, or in ruling upon the other matters that in the regular order of the proceedings in criminal matters would come before him in the case then pending. The editorial *may not have been intended*, but it is *capable* of being construed, as a notice to the trial judge that *no leniency* should be extended to the convicted men, and, *furthermore*, that should the court act contrary to the suggestions contained in the editorial, it might *well expect adverse criticism* in the columns of The Times. Viewing the editorial *in the light of these considerations*, we are satisfied that its reasonable tendency was to interfere with the ordinary administration of justice by the court in the action then pending before it." (R. 127-128)

Unwarranted Assumptions.

The considerations in the light of which the California court concluded the editorial interfered with the orderly administration of justice were, to use its language:

1. Expressions of condemnation of the convicted defendants;
2. Notice to the trial judge that no leniency should be extended to the convicted men;
3. Threat of adverse criticism if the court acted contrary to the suggestions contained in the editorial.

In the editorial there is no condemnation or mention of the convicted defendants other than to say that twenty-two sit-strikers had been found guilty by the verdict of a jury. There is no intimation in the editorial respecting pronouncement of sentence. Threat of adverse criticism is an unwarranted assumption. As stated in the closing paragraph of

the dissenting opinion of the Chief Justice of the California court,

> "All this is indicative of the lengths to which imagination may go in building groundless fears and in imputing potent and obstructive purposes foreign to the intent of the writer." (R. 148)

Regarding like assumptions this court has stated:

> "But the situation is controlled by the *reasonable tendencies* of the acts done and not by *extreme* and substantially impossible assumptions on the subject."[6]

> "And standing alone, as it did in this case, there was nothing which warranted the court or jury in ascribing to this language, either as an inference of law or fact, 'the sinister meaning attributed to it by the state'."[7]

Judges Are Presumed to be Men of Intellectual Discipline and Fortitude.

In a dissenting opinion below, it is said:

> "The asserted contempt is derived entirely from the *supposed* tendency of the language used. * * *
>
> "The first editorial 'Sit-Strikers Convicted' commends the conviction of certain persons as a victory for law and order and expresses pride in the functioning of local courts and juries. It refers to a radio address made by the district attorney and quotes a statement made by him congratulating the jury on one of the 'most far reaching verdicts in the history of this country'. There is certainly nothing in this editorial which should influence *any* judge in the performance of his duty." (R. 145)

In declaring that the editorial should not influence "any judge", the author manifestly did not refer to a "weak

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[6] *Toledo Newspaper Co. v. United States*, 247 U. S. 402, at 421.

[7] *Fiske v. Kansas*, 274 U. S. 380, at 386.

judge" or a "spineless judge", or to "a judge who was politically minded, a judge who was weak with respect to extraneous influence, a judge who has his ear to the ground", as advocated by counsel for respondent in the state court, but probably had in mind the character of individual contemplated by Mr. Justice Holmes and Mr. Justice Brandeis when they said:

> "I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of *reasonable fortitude*, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words."[8]

In *United States* v. *Morgan* (5/26/41), this court, in comparing a cabinet officer exercising judicial functions with judges, declared:

> "Cabinet officers charged by Congress with adjudicatory functions are not assumed to be *flabby* creatures any more than *judges* are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and *intellectual discipline*, capable of judging a particular controversy fairly on the basis of its own circumstances."[9]

Policy of The Times Was Well Known.

It was conceded in the state courts that the long established policy of the Los Angeles Times on the use of violence in labor controversies was well known. The trial court said:

> "It is of no consequence that this editorial, as argued by counsel for respondents, merely expressed the atti-

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[8] *Toledo Newspaper Co. v. United States*, 247 U. S. 402, at 425 (dissenting opinion of Mr. Justice Holmes).

[9] 313 U. S. 409, at 421.

> tude which the Los Angeles Times had maintained for more than fifty years toward those who committed violence during labor disputes." (*R.* 116)

The majority opinion of the state Supreme Court declares:

> "It was stipulated that the allegations contained in said affidavit (Harry Chandler) were true. * * * The weight to be given to this evidence was solely a matter resting with the trial court. * * * The affidavit * * * did no more than *cause a conflict in the evidence* which the trial court resolved against petitioner." (R. 134)

There is no conflicting evidence in the record. Throughout this appeal we have attempted to obtain from counsel for respondent a defense of the court's statement respecting "conflict in the evidence." Nothing has been said in support of it. The matter is emphasized in our Reply Brief (pp. 10-11).

In one of the dissenting opinions below appears this language:

> "Could there be any possible doubt in the mind of any informed resident of Los Angeles on the attitude of the Times in regard to the use of violence in labor disputes. The position maintained by the Times over many years on these matters is clearly established by the record. Its Los Angeles readers would find nothing unusual in the editorial; a judge who felt that it was obstructive or embarrassing would have to confess ignorance of one of the most familiar facts of the daily life of his community." (R. 146-147)

2. "PROBATION FOR GORILLAS?" EDITORIAL STATED IN FULL.

The editorial "PROBATION FOR GORILLAS?" was published approximately two weeks following the verdict of a jury finding two defendants named in the editorial

guilty of assault with a deadly weapon and conspiracy to commit the crime. The editorial was published *five weeks* prior to the date set for hearing an application for probation. The editorial, in three paragraphs, is as follows (R. 23):

> "Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting non-union truck drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with sling-shots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.
>
> "Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.
>
> "It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

Admitted Facts Respecting Probation Proceedings in Los Angeles County.

An affidavit of record (R. 53), admitted and uncontradicted (Orig. R. 155), recites the practice prevailing in Los Angeles criminal courts in probation proceedings. It incorporates excerpts from the book "Adult Probation", by Mr. Justin Miller, which, in commenting on probation proceedings in Los Angeles County, discloses that the probation officer sends letters to persons acquainted with the applicant, seeking detailed information concerning his past life. Voluntary letters are also received, both for and against the granting of probation. In one case, involving violation of the Corporate Securities Act, the Probation Department received petitions and letters containing the signatures of 300 to 400 persons, both for and against the defendant. These and the responses to the inquiries of the probation officer are made a part of a report to the judge before whom the application is pending. The affidavit discloses the Presiding Judge of the Superior Court has declared that the probation officer's report should reflect the identity of the persons sponsoring the application (R. 55).

Admitted Facts Bearing on the Editorial "PROBATION FOR GORILLAS?".

Facts stipulated to be true disclose that the convicted defendants during their trial were described as goon squad members; that the Times acted upon its knowledge of the long-established practice in probation matters for those in charge to invite informed opinion on the question of whether or not probation should be granted; that the Times was aware of the custom of probation officers to send out requests for expressions of opinion; that in one recent probation case, where the Times editorially criticized the granting of probation subsequent thereto, the Presiding Judge of the

Los Angeles Superior Court advised the Times that its position should have been made known while the matter was pending, instead of afterward (R. 52). In the belief that it was qualified to give an informed opinion on the subject, the editorial was prepared and published in an effort disinterestedly to serve what it conceived to be the best interests of the community (R. 52).

Comments of the State Court on the Editorial.

The state court majority opinion declares that another newspaper might publish an article favoring probation, and that

> "We would then have the deplorable situation of a heated newspaper controversy being carried on in the community while the question of probation was before the court for determination. That such a situation would contribute to the orderly administration of justice, we think no one would contend." (R. 132)

This court is authority for the statement

> "that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving *desirable conditions*."[10]

We contend it does not follow that because some hypothetical situation would not contribute to the orderly administration of justice, the instant situation has substantially interfered with the orderly administration of justice. It is our opinion that the granting of probation or parole to convicted felons is a matter of serious public concern, and that public discussion of such applications while they are *actually pending* will promote the administration of justice.

We invite the court's consideration to the brief of the American Newspaper Publishers Association filed in this

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[10] *Cantwell v. Connecticut*, 310 U. S. 296, at 308.

case, and in particular to pages 19 to 21, inclusive, setting forth excerpts from addresses by Mr. J. Edgar Hoover (Federal Bureau of Investigation) citing statistics and expressing persuasive opinion of the advisability of a more stringent administration of parole and probation proceedings. The facts there recited clearly establish the need of pitiless publicity while such proceedings are pending.

The majority opinion of the state court declares they do not mean to hold that a person interested for or against probation of a defendant may not make his views known to the probation officer who will pass the matter along to the trial judge.

> "But to approach the judge either directly or indirectly, through the columns of a newspaper, or otherwise, in our opinion is not permissible." (R. 133)

Rule of Decision Respecting Probation Proceedings.

In California the code (Penal Code 1203) specifically forbids granting probation to a defendant convicted, as were the two defendants mentioned, of an assault with a deadly weapon, and the appellate court has recently so construed the code (see Pet. Br. p. 31). The California appellate tribunals have likewise declared that, in acting upon applications for probation, the court is not controlled by legal rules.

> "It must be guided by considerations pertaining to psychology, sociology and penology, or, in the words of the code, to 'the ends of justice'; by general rules of policy which have not been and in the nature of the case should not be crystallized into positive or definite rules of law."[11]

In proceedings to revoke probation, it has been expressly recognized that the same are *informal* and not governed by legal rules.

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[11] *People v. Jones*, 87 Cal. App. 482, at 497.

"The procedure for revoking probation is wisely made informal. * * * No particular *source*, manner or degree of *proof* is required by statute. * * * Pursuant to our statute, however, the judge or justice having jurisdiction of the cause may, in the exercise of sound discretion, based upon facts presented in an *informal* fashion, from which he has reason to believe the prisoner has violated his probation or is unfit to be at large, revoke the order suspending sentence and commit him to jail."[12]

In one of the dissenting opinions in the state court, we find this language:

"The publisher's affidavit calls attention to the familiar fact that in probation proceedings outside opinions and recommendations are invited. It is further pointed out that a former Presiding Judge of the superior court advised the Times that a criticism of a certain probation order published after it was granted, should have been made while the matter was pending. * * *

"Consider, however, the character of the case, and the circumstances surrounding it. This was no everyday affair, but one in which the public interest was aroused, and the events were widely discussed in the community. * * * The attitude of the Times is made abundantly clear, and its bitter feeling toward certain labor leaders colors its opinions, but what of that? The Times is not on trial for its opinions; * * *. The Times is charged with obstructing justice and interfering with a pending judicial proceeding, and there is *no evidence* whatever of such obstruction or interference. The case had been tried, and verdict rendered; the jury was gone, and matters of sentence and probation were before the judge alone. In deciding these matters the judge has few, if any definite rules to guide him; he is influenced by countless experiences and observations, as well as by the total sum of impressions received from public

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[12] *In re Young*, 121 Cal. App. 711, at 714-715.

and private comment on similar problems throughout his judicial life. * * *

"And what if the judge was, in fact, aware of the views expressed in the third editorial; can it be said he was being informed for the first time of the position of the Times in cases of this character?" (R. 146)

3. "THE FALL OF AN EX-QUEEN" SYNOPSIS AND ANALYSIS.

The editorial "THE FALL OF AN EX-QUEEN" (R. 17) was published two days following the jury verdict of guilty against Mrs. Helen Werner and her husband for grand theft and solicitation of a bribe. The editorial stated that politics is essentially a selfish business, and when of the "boss" type is sordid; that "boss-ship" is the denial of public rights and implies a type of moral obliquity; that it is a contradiction of terms to express regret that the political talents of Mrs. Werner were not directed to other objectives than those which in the twilight of her life have brought her and her husband to disgrace; that her natural flair was purely political and she would have been miscast in any other sphere of activity; that her mistake seems to have been in failing to recognize that her political day was past; for years she was the country's only woman "boss"; that she had a finger in every political pie, and extracted plums for those who played ball with her; that she became a power in city and county affairs and pulled the strings on state and legislative offices. At such times she was known as "Queen Helen"; that it is fair to say the power was more important to her than the perquisites; that with the inevitable turning of the political wheel new figures came to the front, new bosses to the back; she found her grip slipping and it was hard to take; that the several cases of recent years which have brought her before the courts are examples of an energetic effort to reassert her one-time influ-

ence; that it is not illogical that ultimately it should land her behind the bars as a convicted bribe-seeker, but the money meant less to her than the political power to do things with public officials; that at least to herself she remained "Queen Helen".

This editorial apparently was intended to point a moral. It points out rather persuasively that ability devoted to establishing political bossism in a large municipality leads to disaster. Outside the editorial itself, the record contains no facts relating to the subject matter thereof. The facts stated in the editorial constitute a sad commentary on misspent effort. There is no reference to any pending case or any pending proceeding.

The Affidavit of Complaint alleges that the respondents below, petitioners here, *knew* that a motion for new trial was pending and had been set for hearing (R. 16-17). The verified answer denies this allegation of knowledge (R. 32). No effort was made to prove it.

The opinion of the Supreme Court admits this to be the case.

The opinion reads:

> "While the editorial does not refer to the case which was then pending against Helen M. Werner, it *is hardly conceivable* that those in charge of its publication were ignorant of the *pendency* of said action." (R. 130)

The opinion proceeds:

> " * * * it *must be assumed* that the petitioners were cognizant of the action then pending against her, *and* that it had reached the stage which would require either the pronouncement of judgment or the granting of a new trial. With this *knowledge before them*, they prepared and published the editorial * * * ." (R. 130)

These assumptions are unreasonable and unwarranted. They violate the rule of evidence on an issue joined on the

question of knowledge and disregard the elementary rule that in contempt proceedings all intendments are in favor of the accused.[13]

In one of the dissenting opinions, the editorial is spoken of as follows:

> "The * * editorial 'The Fall of an Ex-Queen' is a brief and penetrating commentary on the political activities of Helen M. Werner. The subject of the editorial is used as an object lesson and the principal thought expressed therein is that political bosses rise and fall with changing times. I cannot find anything in this editorial which can be said to have even a *remote tendency* to obstruct the administration of justice or to influence or embarrass any judge." (R. 145)

The State Court Declared There Had Been an Actual Interference in Each Instance.

The California court concluded that each of the editorials constituted an *actual* interference with the orderly administration of justice. The opinion reads:

> " * * * the detriment caused by the publication of said editorials was the *probable denial of a fair trial* to the litigants in the actions then pending before the courts which were the subject of said editorials." (R. 138)

In each instance the trial was completed before the editorial was published. In one instance the trial had been completed two weeks before the editorial appeared. In each instance the editorial appeared before judgment was pronounced, but the pronouncing of judgment is no part of the trial. In a criminal proceeding the trial ends with the verdict of the jury. Nowhere is this more definitely established than in

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[13] *In re Shuler*, 210 Cal. 377, at 387; *Frowley v. Superior Court*, 158 Cal. 220, at 224; *Hall v. Superior Court*, 124 Cal. App. 603, at 605; *State v. American-News Co.*, 64 So. Dak. 385.

California. The California appellate courts have stated in so many words that

> "Pronouncing judgment, which is the formal declaration of sentence, is not the trial, nor any part thereof * * *. The trial ended with the announcement of the verdict of the jury, whereby it declared the result of its deliberations upon the issues of fact which had been submitted to it for its decision."[14]

Meaning of Finality in Pending Matters.

The editorial "SIT-STRIKERS CONVICTED" makes five references to a verdict previously rendered. As stated in one of the dissenting opinions:

> "The case had been tried, and verdict rendered; the jury was gone, * * *." (R.146)

The majority opinion in the state court declared:

> "While neither motion [for a new trial] nor application [for probation] had been made at the time of the publication of the editorial ["SIT-STRIKERS CONVICTED"], the right of the defendants to pursue said remedies existed * * *. We can see no force in petitioners' argument that because the editorial was published after the verdict, but prior to the making of said motion or application, the proceedings in the case had reached such *a point of finality* as to form a proper subject of comment." (R. 125)

In California, perhaps generally (16 *Corpus Juris*, p. 536, Sec. 1008), after a verdict of guilty the presumption is that the defendant is guilty.[15]

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[14] *People v. Stokes*, 5 Cal. App. 205, at 214-215.

[15] *People v. Arlington*, 131 Cal. 231, at 235; *People v. McNamara*, 94 Cal. 509, at 514; *Ex parte Brown*, 68 Cal. 176, at 180, 182, 183; *In re Wilkins*, 66 Cal. App. 754, at 758; *People v. Anderson*, 58 Cal. App. 267, at 274.

It is the verdict of the jury and not the pronouncement of sentence by the court that convicts a defendant of crime. Conviction is the verdict which ascertains and publishes the fact of guilt. Judgment or sentence denotes the action of the court "declaring the consequences to the convict of the fact thus ascertained."[16]

In the *Shuler* contempt proceedings in Los Angeles[17] (cited by respondent), Reverend Shuler, in a series of radio broadcasts, assailed the integrity and impugned the motives of various judges of the Los Angeles County Superior Court. The California Supreme Court, by unanimous opinion, reversed the conviction for contempt as to the first count in the affidavit of complaint. This count charged that upon the calling for trial of a notorious criminal case, the District Attorney requested a continuance on the ground that defendants were expected to act as state's witnesses in another pending criminal case. The judge presiding denied the request and two days later Shuler violently criticized his conduct and questioned his motives. The criminal proceedings were still pending. The Supreme Court declared:

> "Regarding the discourse as a whole, it appears that the main burden of its criticism of Judge McComb, would seem to have consisted in an attack upon certain of his rulings in the cases of the two defendants before him, which might be said to have *reached such a point of finality* as to form a proper subject of comment on the part of any citizen, under the broad terms of the provision of the Constitution guaranteeing liberty of speech, and of the press."[18]

The holding in the *Shuler case* that a point of finality, justifying vitriolic comment, had been reached before the trial

[16] *In re Anderson*, 34 Cal. App. (2d) 48, at 50.
[17] *In re Shuler*, 210 Cal. 377.
[18] 210 Cal. at 386-387.

commenced, cannot be reconciled with the holding herein that a point of finality had not been reached, justifying temperate comment, after the trial was completed, the comment in each instance referring to a completed step in the criminal proceedings.

The State Court Declares the Fate of the Defendant Is Not Finally Determined by the Verdict.

The California court declares:

> "It cannot be successfully contended that the verdict was decisive of the case or was a *final determination of the fate of the defendants.*" (R. 125)

Unquestionably many conventional court proceedings are open to a convicted felon after verdict and prior, as well as subsequent, to sentence. During these proceedings the presumption exists that the defendant is guilty as found.[19]

A final determination of the fate of a defendant found guilty of a capital offense is reached either by pardon or execution. In a capital case, where the defendant pleads guilty and is sentenced to death, until he is executed conventional proceedings are open to him for staying execution, prosecuting an appeal, causing delay of a year or more, and perhaps securing a reversal of the judgment passing sentence of death entered upon his plea of guilty. This has occurred of recent date in California.[20]

Following a verdict or plea of guilty, the rule of the California court proscribes comment which any judge in summary proceedings may conclude from an introspective consideration has a tendency to influence either the judge in pronouncing sentence, or a jury in its deliberations in event of new trial. The opinion of the California trial court specifically anticipates the latter contingency.

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[19] *In re Wilkins*, 66 Cal. App. 754, at 758.
[20] *People v. Campos*, 3 Cal. (2nd) 15.

"If [motion for new trial is] granted, the action would still be pending and if tried a second time prospective jurors *no doubt* would have been influenced by the editorial." (R. 110)

Respondent's Concessions re Finality.

In the briefs of respondent in this court, however, counsel concede that finality of the particular *proceeding or matter* under discussion justifies public comment on judicial proceeding, and that finality of judgment in the case is not required.

From the Supplemental Brief of Respondent we quote:

"It should be remembered that discussion is not necessarily deferred until the entire cause is ended; that it is improper only as to pending matters."[21]

And again,

"Finality is requisite, but it is finality of the matter under discussion. So held as to the first count of the Shuler case in 210 Cal. at 387. But it was likewise there held that the finality of that *first phase* of the cause did not warrant the discussions mentioned in the second and third counts and which related to *approaching* judicial action on *other* phases of the case. So at bar, petitioners *were not convicted* because of the relation of their publications *to the verdicts* mentioned; it was because of the potential influence upon phases of the case which were still pending and which would require early action by the judge."[22]

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[21] Resp. Supp. Br. 31.

[22] Resp. Supp. Br. 41.

Clear and Present Danger Doctrine Should Have Been Applied.

History of Clear and Present Danger Doctrine.

The clear and present danger doctrine, as applied by this court, was first announced in the opinion of Mr. Justice Holmes in *Schenck* v. *United States*,[23] decided in 1919, although its adoption and application did not result in a reversal of the judgment. Not until 1937, in *Herndon* v. *Lowry*,[24] was a judgment reversed because of failure to apply this standard. This decision was by a divided court. Subsequently this test has been frequently announced by this court and judgments below reversed because of failure of the state court to apply the doctrine. Eventually, in *Cantwell* v. *Connecticut*,[25] in 1940, the doctrine was adopted by unanimous opinion and the judgment below reversed.

Petitioners' Position.

Throughout, petitioners have contended that the clear and present danger doctrine should be applied in proceedings to punish for constructive contempt by publication and *a fortiori* in jurisdictions, such as California, where the proceedings are summary. Respondent's reply is that the two tests (tendency to interfere and clear and present danger) are substantially identical, but, if not, the circumstance that the obstructive quality of the publication must be established beyond a reasonable doubt causes "this difference in degree or danger"[26] to become academic. In a summary proceeding the tendency doctrine, as applied by the California state court, permits the judge conducting the proceedings to determine, from a subjective or introspective

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[23] 249 U. S. 47.
[24] 301 U. S. 242.
[25] 310 U. S. 296.
[26] Resp. Supp. Br. 19.

consideration of the editorial, whether it has a tendency to interfere with the orderly administration of justice, and, as the California Supreme Court declared, the stipulated facts of the case, as contrasted with such introspective consideration, did no more than cause a conflict in the evidence (R. 134; Pet. Rep. Br. pp. 10-11).

The clear and present danger doctrine, as construed and applied in the several opinions of this court, requires an objective consideration, that is, a weighing of the evidence and a determination "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about"[27] a substantial interference with the orderly administration of justice.

When a judge might conclude, from an introspective consideration of an editorial, that it had a *reasonable* tendency to interfere, is impracticable, if not impossible, of determination. The degree of proof would vary not alone with different judges but perhaps with different moods of the same judge. Such a test is thought by petitioners to be so vague and indefinite as to justify the declaration that it "is repugnant to the guarantee of liberty contained in the Fourteenth Amendment."[28]

Legislative Declaration of State's Policy.

In *Gitlow* v. *New York*, the opinion states:

> "By enacting the present statute the State has determined, through its legislative body, that utterances

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[27] *Schenck v. United States*, 249 U. S. 47, at 52; *Schaefer v. United States*, 251 U. S. 466, at 482 (dissenting opinion of Mr. Justice Brandeis); *Gitlow v. New York*, 268 U. S. 652, at 672 (dissenting opinion of Mr. Justice Holmes); *Herndon v. Lowry*, 301 U. S. 242, at 256; *Thornhill v. Alabama*, 310 U. S. 88, at 105; *Cantwell v. Connecticut*, 310 U. S. 296, at 311.

[28] *Herndon v. Lowry*, 301 U. S. 242, at 259.

> advocating the overthrow of organized government by *force, violence and unlawful means,* are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. *That determination* must be given great weight."[29]

In *Cantwell* v. *Connecticut,* it is said:

> "Such a declaration of the *State's policy* would weigh heavily in any challenge of the law as infringing constitutional limitations."[30]

In California we have a legislative declaration of the state's policy, which should weigh heavily in any consideration of the law on the subject of constructive contempts by publication. The statute reads:

> "No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the *immediate presence* of such court while in session and in such a manner as to *actually interfere* with its proceedings."[31]

The occasion for the adoption of this statute resembled that which resulted in the enactment of the federal contempt statute of 1831 immediately following the impeachment proceedings of Judge Peck.[32] The Supreme Court of California, however, has rejected this legislative determination, has declared the statute unconstitutional, assigning as reason therefor the inherent power fallacy predicated on the legal and historical error of the *Wilmot opinion,* which has been rejected in every well considered discussion of recent time.

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[29] 268 U. S. 652, at 668.

[30] 310 U. S. 296, at 307-308.

[31] *Code of Civil Procedure* 1209, Subdiv. 11.

[32] See dissent of Mr. Justice Edmonds in *Bridges case,* 14 Cal. (2d) 464, at 504-507.

Indefiniteness of Test (Adopted by the State Courts).

The test applied, whether by statute or judicial decision, should be

> " * * * 'sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties,' and be couched in terms that are not 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' "[33]

Applying this test to the Times editorials, we have this situation: The gentlemen of a committee of a local bar association, who instituted and prosecuted these proceedings, it is fair to assume, proceeded after mature deliberation and industrious analysis of the Times editorials. By affidavit preceding issuance of citation of contempt, and by argument subsequent thereto, these attorneys contended that each of the seven editorials complained of constituted a contempt of court under the reasonable tendency theory. The trial judge declared that but *five* of the seven were contumacious and that two were not. Upon review the state Supreme Court held that only three of the seven were proscribed. Two members of the court were of the opinion that no one was contemptuous.

With such divided opinion among attorneys and judges, we think it persuasive to the point of conviction that the tendency test, as applied by California courts, is an example of "judicial caprice",[34] and that the test is not "sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties", and that it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[35]

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[33] *Whitney v. California*, 274 U. S. 357, at 368.

[34] *Law and Its Administration*, by Harlan F. Stone (Columbia University Press, 1924), p. 45.

[35] *Whitney v. California*, 274 U. S. 357, at 368.

If a citizen, in the exercise of this "vital individual freedom," must guess against "the possibility of a jail sentence under a summary punishment for contempt",[36] is he not being silenced by "oblique methods"[37] of censorship?

In the opinions of this court is found authority for the statement that silence coerced by law is the argument of force in its worst form.[38]

Criteria Suggested by Respondent Are Vague and Undefined.

The criteria suggested by respondent in its Supplemental Brief will utterly confound the average citizen. We quote some of them:

> "potential influence upon phases of the case which were still pending."
>
> "publications which are so timed and circumstanced as to possess sufficient momentum to invade the judicial chambers."
>
> "potentiality to interfere with the deliberations of the Supreme Court."
>
> "the requisite reasonable tendency to disrupt the judicial calm."
>
> "the utterance and its inherent momentum."[39]

These expressions qualify for the "vague and undefined terminologies in dragnet clauses" referred to in a dissenting opinion in the *Meadowmoor Dairies case*.[40]

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[36] *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, at 302, 308 (dissenting opinion of Mr. Justice Black).

[37] *Mr. Justice Brandeis* (Yale University Press, 1932), p. 111.

[38] *Whitney v. California*, 274 U. S. 357, at 375-376 (concurring opinion of Mr. Justice Brandeis).

[39] Resp. Supp. Br. 41 and 42.

[40] 312 U. S. at 312.

This court announced in the *Thornhill case:*

> "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society."[41]

Free Speech Involves Practical Considerations. The Tendency Test is Always Speculative, Sometimes Fanciful.

In their exercise the rights of free speech and a free press are essentially exact or *practical* affairs.

Actual interference with the orderly administration of justice is likewise a practical matter. On the other hand, determination of what constitutes a tendency to interfere is essentially a speculative proceeding.

Whether a tendency to interfere exists will always be a matter of speculation, perhaps of fancy or imagination, as suggested in the instant case in one of the dissenting opinions (R. 140, 148).

When the practical exercise of freedom of speech or of the press is abridged, the rule of abridgment, if it is not the equally practical rule of actual interference, should be not less than the clear and present danger doctrine.

Responsibility of the Courts in Contempt Proceedings.

In *Schneider* v. *State* it is said:

> "* * * the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."[42]

Perhaps the task is more delicate and difficult where the exercise of these rights is said to substantially interfere

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[41] 310 U. S. 88, at 104.

[42] 308 U. S. 147, at 161.

with the orderly administration of justice. Not alone the courts, but the public is interested in the administration of justice and in the maintenance to a prominent and conspicuous degree of the independence, integrity and impartiality of the courts. It does not promote the public concept of intelligence and independence of the courts to have a judicial determination that our judges are so responsive to outside influence, and so lacking in mental discipline and fortitude, that in the orderly administration of justice, under like circumstances to those of record in the Los Angeles Times case, like editorial comment must be proscribed. The exercise of the rights of freedom of speech and of the press will be impaired and abridged, and respect for, and confidence in, the intelligence and independence of the courts appreciably diminished, if the judicial tribunals of last resort declare that judges are such flabby creatures that, following return of the jury's verdict of guilty in felony cases, temperate comment and commendation of law enforcement must be withheld until the fate of the defendant has been finally determined. A proper exercise of the right of free speech and a free press, and the proper observance of the correlative duty imposed, will not permit such abridgment of these fundamental rights. The maintenance of the correct and popular conception of independence, integrity and intelligence of the courts should not permit judicial announcement that the infirmities of its judges require such whittling away of the Bill of Rights. Trial judges are not men of such delicate moral fibre and frail mental fortitude that dignified and temperate approval of administration of law enforcement following verdicts of guilt must be withheld until all conventional proceedings have been exhausted by the convicted felon.

Accommodation of Constitutional Guaranties and Governmental Functions.

The California Supreme Court declared that "Liberty of the press is subordinate to the independence of the judiciary • • • ." (R. 137)

We think the statement is unfortunate and unnecessary. If the disposition of this case requires an adjudication of this precise point, we take the position that the statement is incorrect.

The state Supreme Court should have said, as did this court in the Flag Salute case:

> "Our present task, then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other."[43]

And might well have paraphrased the language of this court and declared:

> But because in safeguarding freedom of speech and of the press we are dealing with interests so essential and so dear, every possible leeway should be given to the claim of freedom of the press.

The holding of this court, as reflected by several opinions, has not been to subordinate constitutional liberties to governmental functions when the exercise of the one appears to conflict with the administration of the other. The practice has been to reconcile the rights or to accommodate the exercise of one and the administration of the other, to the end that there will be reasonable enjoyment and administration of each without subordination of either.[44]

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[43] *Minersville School District v. Gobitis*, 310 U. S. 586, at 594.

[44] *Whitney v. California*, 274 U. S. 357, at 374 (concurring opinion of Mr. Justice Brandeis); *Herndon v. Lowry*, 301 U. S. 242, at 258; *Schneider v. State*, 308 U. S. 147, at 161, 164; *Thornhill v. Alabama*, 310 U. S. 88, at 95-96; *Cantwell v. Connecticut*, 310 U. S. 296, at 304, 307, 308; *Minersville School District v. Gobitis*, 310 U. S. 586, at 593-594, 596; *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, at 298-299; *American Federation of Labor v. Swing*, 312 U. S. 321, at 325-326.

From the dissenting opinion in the Flag Salute case we quote:

> "• • • where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both and that • • • is the function of courts to determine whether such accommodation is reasonably possible."[45]

The judicial is one of the three coordinate departments of government. The administration of justice is a governmental function. If it appears that the exercise of this governmental function by the state comes "into fatal collision with the overriding interest protected by the federal compact",[46] a "reasonable accommodation between them so as to preserve the essentials of both"[47] requires application of the actual obstruction test, or at least the clear and present danger doctrine, in summary proceedings for contempt by publication. Although its mandate has been rejected by the state court, the California legislature has adopted and proclaimed the actual interference test in summary proceedings for contempt by publication. In accommodating exercise of constitutional right and administration of governmental function, the legislature should not be denied "the right to select appropriate means for its attainment • • • ."[48] If there is no actual interference with the administration of justice, there should be no actual interference with the "constitutional guaranties of civil liberties and the specificity of their command where free-

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[45] *Minersville School District v. Gobitis*, 310 U. S. 586, at 603.

[46] *Cantwell v. Connecticut*, 310 U. S. at 307.

[47] 310 U. S. at 603.

[48] 310 U. S. at 595.

dom of speech"[49] is concerned. Such we believe to be a "reasonable accommodation between" "the interests of government and of liberty under the Constitution."[50]

In summary proceedings for contempt by publication, adoption of the actual interference test or the clear and present danger doctrine will comply with the requirement announced by this court in *De Jonge* v. *Oregon* (1937), that "legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."[51] Proscribing all comment on judicial proceedings until finally terminated would constitute a curtailment and abridgment of the right of free speech. However, the right would not be abridged, but its abuse would be dealt with, if comment upon pending judicial proceedings is proscribed, only when it is of such a nature and published under such circumstances as to bring about an actual interference, or create a clear and present danger that it will bring about a substantial interference with the judicial proceedings about which comment is made.

CONCLUSION.

For the reasons assigned in the several briefs of petitioners and those of amici curiae, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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[49] *Minersville School District v. Gobitis*, 310 U. S. 586, at 602 (dissenting opinion of Mr. Justice Stone).

[50] 310 U. S. at 603.

[51] 299 U. S. 353, at 364-365.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 3

THE TIMES-MIRROR COMPANY, a corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, 1939.

No. 972.

THE TIMES-MIRROR COMPANY, a corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Petitioners Were Not Summarily or Arbitrarily Tried or Convicted.

Petitioners would convey the impression that they have been "summarily laid by the heels" (Pet. pp. 18-19) in a proceeding so "summary" (pp. 14, 18) as to deprive them of substantial rights. If they use the phrase "summary proceeding" in the sense of trial without a jury, the record discloses that no demand for jury was made and, hence, no grievance suffered in that respect. The court,

in *In re Rockford Produce & Sales Co.*, 275 Fed. at 813, said:

> "A summary proceeding ordinarily implies one begun without summons or subpoena, and is usually tried upon affidavits and upon short notice, or determined even as an *ex parte* matter."

If this is the sense in which petitioners use the word "summary", the record clearly refutes their contention. Apparently they are attempting to bring themselves within the "arbitrary pretense" test of Mr. Justice Holmes, who said in *Patterson v. Colorado*, 205 U. S. 454, 460:

> "It is argued that the articles did not constitute a contempt. * * * However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of *as an arbitrary pretense for an arbitrary punishment.*[1] Supposing that such a case would give the plaintiff in error a standing here, *anything short of that is for the state court to decide. What constitutes contempt, as well as the time during which it may be committed, is a matter of local law.*"

But the record shows that the proceeding was free of all the characteristics of summariness or arbitrariness. It commenced on June 3, *1938* [R. 26], and ended on February 29, *1940* [R. 149].

It was initiated by the Los Angeles Bar Association [R. 1, 5], whose Executive Secretary made affidavit charging five separate contempts [R. 9-25]. An order to show cause was issued on June 3, 1938 [R. 25]. Immediately thereafter, on June 5th and 7th, the Los Angeles

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[1]All italics ours, unless otherwise indicated.

Times published two editorials entitled "A Black Committee Here?" and "Curious Reasoning", the first of which was thus described by the trial judge:

> "Generally it is a criticism of the committee for having commenced the first proceeding. Their act is referred to as 'an effort to set up a sort of a local Black Committee of press censorship'," [R. 116.]

and the second:

> "This editorial, like the last, consists of a statement of the facts from the standpoint of the respondents and an argument upon the law relating to their previous citation for contempt." [R. 117.]

A second contempt proceeding having been commenced for the publication of these editorials, both matters thereafter progressed simultaneously. They were transferred to a department other than that of the judge who issued the order [R. 2, 26, 89]. Demurrer was filed by petitioners herein on June 28th [R. 4]. It was argued for a period of *seven* days, July 6th-14th [R. 90-93].

As counsel for petitioners later phrased it, "We argued here at great length and had ample opportunity to present and the court heard us with far more than ordinary patience and what appeared to me to be with more than ordinary attention" [R. 86].

The court, on August 18th, sustained the demurrer without leave to amend as to the second and fourth counts of the instant proceeding and overruled it as to the other counts [R. 94]. At the same time the judge, Honorable Emmet H. Wilson, rendered an exhaustive and conspicuously able opinion [R. 95-118]. Thereupon petitioners filed answers [R. 5] and the matter was tried upon the issues thus raised [R. 94]. It was not presented on

affidavits or handled summarily; it was tried upon oral evidence in the same manner as any ordinary civil or criminal case [R. 66-88]. Petitioner Hotchkiss testified in his own behalf [R. 84], as did the general manager of the corporate petitioner [R. 82]. At the conclusion of the hearing counsel for petitioners said:

> "We have read the decision of the court with much interest and I dare say with some considerable instruction and we appreciate that it represents on Your Honor's part, as our efforts represented on our part, your very best efforts after hearing both sides of this matter and after giving the matter your mature, conscientious consideration, and we respect your opinion as such. We make this statement not only out of appreciation for the courteous consideration which we have been shown here, but the straightforward and convincing manner in which Your Honor has handled it." [R. 86.]

This immediately preceded petitioners' conviction upon the three remaining counts[1] [R. 88] and upon the two counts of the second proceeding [R. 88]. Judgment was rendered on August 31st [R. 61].

Certiorari was granted in both cases by the California Supreme Court [R. 62]: the two cases were presented upon a consolidated record [R. 64] and orally argued and submitted on December 7, *1938* [R. 119]. That submission was set aside and on November 2, *1939*, the cause was

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[1]None of the cases mentioned in these counts was pending before the judge who issued the order to show cause or the judge who heard the contempt proceeding. This appears from the official reports of *People v. Busick*, 32 Cal. App. (2d) 315; *People v. Werner*, 29 Cal. App. (2d) 126; and *People v. Shannon*, 28 Cal. App. (2d) 677.

reargued and resubmitted [R. 119]. And the matter was elaborately briefed. Petitioners filed an opening brief of 242 pages, a reply brief of 46 pages, and a supplemental brief (filed at the time of the second argument) comprising 49 pages. The cause was decided two months after the reargument, on January 31, 1940 [R. 120]. Petition for rehearing was denied on February 29th [R. 149], and petitioners given three months to prepare and present their record in this court [R. 150].

The measured and temperate opinions of Judge Wilson and the Supreme Court show that both tribunals accorded petitioners fullest opportunity to defend and arrived at the conclusion that they had abused their acknowledged right of free speech only after a painstaking review of the facts and the applicable law. No better proof of this could be found than the remarks of counsel for petitioners made in the trial court [R. 86], which we have already quoted.

A Virtual Confession of Guilt on One Count.

And as to the merits Mr. Cosgrove, who represents petitioners here, made a statement which was tantamount to an admission of guilt on one count—which will indeed bear no other rational construction. He said [R. 87]:

> "* * * I honestly and sincerely believed and, with great deference to the court, I still honestly believe that *with the possible exception of one of these editorials* that they did not commit a contempt of court, but at the same time that like any other matter that is contested in the court is one in which counsel may have honest differences of opinion."

This admission doubtless referred to "Probation for Gorillas?" [R. 23], which, after castigating the defendants in the pending criminal action, shook the publisher's finger under the judge's nose and, calling him by name, said:

> "It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shan..on and Kennan Holmes. This community needs the example of their assignment to the jute mill." [R. 23-24.]

The Supreme Court said:

> "But little is said, or can be said, in defense of the publication of this editorial" [R. 131],

and that:

> "* * * petitioner, The Times-Mirror Company, advances no serious defense of its publication of said editorial in so far as the character and nature of the editorial are involved * * *." [R. 131.]

The attempt to raise a constitutional question under these circumstances seems to lend color to the remarks of Mr. Wirin's *amicus curiae* brief:

> "For fifty years it (The Times) has had much to say in its editorial columns upon many public

issues. Not once, however, has it ever raised its voice in defense of freedom of speech for anyone other than for itself and for those in its, and its publisher's economic class. When Yetta Stromberg, California radical; Angelo Herndon, young communist; Amy Lovell, religious fanatic, and Kim Young, Los Angeles student, asserted that they had been deprived of freedom of speech, the 'Times' maintained a studied silence. Now that its own freedom is affected it protests stoutly that its freedom of speech has been abridged by its conviction for contempt of court." (pp. 2-3.)

Renewal of Claim That Freedom of Press Is an Absolute Right.

The American Newspaper Publishers Association in its *amicus curiae* brief asserts that "Probation for Gorilias?" "is a proper exercise of the function of the press in presenting views on a vital public issue in the field of criminal law enforcement where complaints about ill-advised clemency are frequently expressed" (p. 9). It doubtless takes this position because of its conception (p. 3) that the Federal Constitution prohibits "every conceivable form of abridgment of freedom of the press. *Any restraint from any source and by any method* was considered repugnant to the constitutional guarantee" (p. 3; italics by author).

Were it not for the endorsement of "Probation for Gorillas?", we would assume that this language connoted freedom of speech (or press) in the qualified sense which

is wellnigh universally recognized and is thus phrased in *In re Shortridge*, 99 Cal. at 535:

> "Liberty of the press must not be confounded with mere license. Liberty of the press stops where a further exercise would invade the rights of others."

Or, as Judge Wilson phrased it:

> "Reasonably limited this freedom is an inestimable privilege in a free government, but without limitation it might become a scourge to state or nation."[1] [R. 98.]

But the Association's endorsement of this address to the judge upon a pending matter leaves no escape from the conclusion that it deliberately advocates newspaper exemption from "any restraint from any source or by any method".

The extreme doctrine now advocated by the *amicus curiae* is but a revival of a series of unsuccessful attempts to push a recognized liberty beyond reasonable bounds. Though the principle had been announced in *Near v. State of Minnesota*, 283 U. S. 697, 715, it was necessary for the court to decide as late as 1936 that the constitutional guarantee does not afford immunity from liability for libel (*KVOS v. Associated Press*, 13 Fed. Supp. 910, 912). This same liberty has had to yield to a prohibition of use of the mails in furtherance of lotteries (*Ex parte Rapier*, 143 U. S. 110). The effort of the newspapers to exempt themselves from the application to their editorial staffs of the National Labor Relations Act

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[1]See *Gitlow v. New York*, 268 U. S. at 667.

met with this response in *Associated Press v. National Labor Relations Board,* 301 U. S. at 131-33:

> "Does this statute, as applied to the petitioner, abridge the freedom of speech or of the press safeguarded by the First Amendment? We hold that it does not. * * * The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court."

It is indisputably established (indeed, *petitioners* concede the fact) that freedom of speech or of the press does not immunize conduct which constitutes contempt of court according to recognized standards. Petitioners merely inveigh against the established criterion—reasonable tendency to influence or interfere with the deliberations of the court.

Pending Court Causes Have Been Excluded From the Field for Unrestrained Speech.

Contrasted with the claim of the Publishers Association that it is not meet that judges stand "aloof from the democratic check of public opinion" concerning pending causes (p. 4) is the recent limitation to political and economic matters of the permissible field of free speech. *Thornhill v. Alabama,* 84 L. Ed. (Adv. Op.) 659, 662:

> "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread

> *political and economic truth.* Noxious doctrines *in those fields* may be refuted and their evil averted by the courageous exercise of the right of free discussion."

This language, read with *Near v. Minnesota* (cited with approval at p. 663), appears to have been carefully designed to exclude any trespass of free speech upon the domain of court independence, which (to borrow the language of *Carlson v. State of California*, 84 L. Ed. (Adv. Op.) at 671) "falls within the allowable area of state control". The *Near* case,[1] it will be recalled, says:

> "But it is recognized that punishment for the *abuse* of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. *There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions.* Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689; Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. Ed. 1186, 1193, 38 S. Ct. 560."

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[1]283 U. S. at 715.

Plainly the reason for this exclusion of pending court proceedings from the aegis of free speech is correctly stated by Mr. Justice Holmes in *Patterson v. Colorado*, 205 U. S. at 462:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with respect to a court."

And the matter is further explained by Judge Wilson, at R. 104, as follows:

> "The judicial department of the government is not on a parity with its coordinate branches. The legislator and the executive may receive petitions and advice from their constituents, they may express their opinions upon any subject at any time, yet they are not disqualified from acting. This freedom is forbidden ground to the judge. To learn any facts concerning a case, to discuss its merits, to hear any argument except in open court, or to express an opinion before hearing the evidence, is to disqualify him. Neither may he go upon the public rostrum, give interviews to the newspapers, or circularize the public, in explanation or in defense of his judicial acts. The reason for his decisions must appear from the decisions themselves."

The claim that public interest endues the publisher with immunity from such trespasses upon the court's exclusive domain was definitely refuted by the decision in the *Toledo Newspaper Company* case, 247 U. S. at 419-20.

I.

Editorials in Question Were Contemptuous According to Any Suggested Standard.

The sterile nature of petitioners' claim of denial of constitutional rights becomes immediately manifest, without necessity of legal refinement of definition of adequate tests, when the true nature of each editorial is understood.

The Publishers Association asserts in its brief that "Regardless of what test is applied, the editorials are clearly within the limits of permissible comment and criticism" (p. 7). On the other hand, we are equally positive that they are contemptuous regardless of the test applied to them.

Although we stand upon the rule that "What constitutes contempt, as well as the time during which it may be committed, is a matter of local law,"[1] nevertheless a brief review of the editorials upon which conviction was based will disclose beyond a peradventure that there is no federal question here.

Editorials Viewed as a Whole.

The Supreme Court, summarizing as to the three editorials, concluded:

> "In the present case the detriment caused by the publication of said editorials was the *probable denial of a fair trial* to the litigants in the actions then pending before the courts which were the subject of said editorials." [R. 138.]

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[1]See Point II hereof.

The first and fifth counts [R. 9, 22] relate to prosecutions of labor representatives. An affidavit of Harry Chandler, president of the corporate petitioner, was received as evidence at the trial by consent [R. 80]. Mr. Chandler said:

> "With the editorial policy of the Los Angeles Times I have been intimately familiar and have contributed greatly to the shaping of said policies during the past approximately thirty years.
>
> "For approximately fifty years the Los Angeles Times has been the principal newspaper exponent in the United States of the open shop system of industrial relations." [R. 42-43.]

Mr. Chandler further says that, in advocacy of its "open shop" industrial policy, the Times "has done *everything in its power* to establish and maintain the open shop principle" [R. 44]; that it has "resisted to the extent of its ability * * * attempts to establish within *its sphere of influence* conditions inimical to that policy" [R. 44]. Its "vigor and determination" in "its opposition to everything hostile thereto have made it a leader of community thought and action" in these matters, so he avers [R. 44], and this has become true to such an extent that "The Times believes itself to be qualified to give an informed opinion on matters such as that involved in the probation matter above mentioned" [R. 52]. And the expression of such opinions (so that they will reach the court[1]) serves "what it conceives to be the best interests of this community" [R. 52].

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[1]That the editorial was actually intended for the court also appears from the discussion at page 12 of petitioners' brief.

And so, although the Times has continuously kept the public *factually* informed on these matters [R. 45, 47, 50], it concludes that that is not enough when the C. I. O. "sit-strikers" are to be sentenced and the "goon squad" defendants are perhaps to be shown leniency by way of probation; it feels itself "privileged and expected to speak" for "the community" [R. 44]. To whom? The judge, of course. The facts have been repeatedly laid before the public, and so the conclusions advanced in the editorials can be intended only as a direct address to the judge or for the purpose of fomenting public opinion so that it will be brought to bear upon his expected decision. In one instance, the judge was addressed by name: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes" [R. 24]. Indeed, Mr. Hanson contends (p. 8) that the newspaper function in these matters is "as a molder of community opinion," with the obvious objective that the judge shall not remain "aloof from the democratic check of public opinion" (p. 4).

This well-known policy of the Times dovetails into its "doing everything in its power" [R. 44], political or otherwise, to accomplish its end of defeating the closed shop policy "within its sphere of influence". Its enormous political power was as well known to itself as to the judges of the Los Angeles Superior Court, and was judicially noticed by the Supreme Court [R. 128]. These editorials were directed to an elective judiciary and one of them to its youngest and newest judge, A. A. Scott, whose appointive term of office would soon expire.

In the *Werner* case [R. 16] the trial judge disclosed that he had given consideration to newspaper articles. The record (of which Judge Wilson, the California Su-

preme Court and this court may properly take judicial notice[1]) shows that upon the hearing of the motion for new trial, counsel for defendants inquired "whether, if application for probation were made, it could do other than delay the passing of sentence?" The judge responded, in part, as follows:

> "The theory upon which probation is granted is one of rehabilitation, and where defendants are in the frame of mind that these defendants undoubtedly are, where I believe—*if certain things which I have read in the public press are, perhaps, true*—they go even further than that and feel that they have had an unjust trial, that there has been a miscarriage of justice, that they have not been dealt with fairly at all, naturally there is no ground there upon which there could be a meeting of the minds, Mr. D'Orr." [4 Crim. No. 436, Tr. pp. 862-3.]

This case was reversed (*People v. Werner*, 29 Cal. App. (2d) 126). Who can say what was the quantum of error which the newspaper contributed to the ruling denying the motion for new trial? But amount of contribution is immaterial; the fact is all important. If news items thus wrought influence upon the judicial mind, what about editorials pointing out the Times' lay opinion as to the proper judicial ruling?

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[1]*Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209; *City of Los Angeles v. Abbott*, 217 Cal. 184, 192, 193; *Wood v. Kennedy*, 117 Cal. App. 53, 60-61; *Estate of Barreiro*, 125 Cal. App. 752, 754; *Hollenbach v. Schnabel*, 101 Cal. 312, 315-16; *Schomer v. R. L. Craig Co.*, 137 Cal. App. 620, 627; *In re Blythe*, 108 Cal. 124, 126; *Scovell v. Johnson*, 165 Cal. 762, 768; *Gay v. Gay*, 146 Cal. 237, 241; *Allen v. Indus. Acc. Com.*, 3 Cal. (2d) 214, 215.

"Sit-Strikers Convicted".

On December 20, 1937, twenty-two "sit-strikers," including Busick and Schmolder, "CIO organizers and ringleaders of the strike"[1] [R. 47], were convicted of a conspiracy to violate sections 418 and 594 of the Penal Code [R. 10], which respectively define the crimes of forcible detainer of the premises of another and malicious destruction of property. Each of these crimes is defined as a misdemeanor, but section 182, Penal Code, makes it optional with the court in its discretion to treat the offense as a misdemeanor or a felony, and section 17 provides that in case the court imposes a fine or a county jail sentence the crime shall thereafter be deemed a misdemeanor for all purposes.

On said 20th day of December, Judge Ambrose, the trial judge, fixed December 22nd as the date for sentence [R. 10]. That date automatically became the time for hearing a motion for new trial (Pen. C., Secs. 1200-1201), or for probation, if such an application was meantime permitted (Pen. C., Sec. 1203). Also it would become necessary, upon sentencing the defendants, to determine whether they should be treated as felons or merely misdemeanants. The editorial "Sit-Strikers Convicted" immediately preceded a ruling upon all of these matters, some of which were necessarily presented for determination at time of sentence, and others of which would in all probability be likewise presented.

Presumably three hundred and ninety-four "sit-strikers" had been indicted [R. 46], and all but twenty-two of them had been exonerated by Judge Bishop [R. 47].

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[1]Chandler affidavit.

Upon their first trial the jury disagreed as to the defendants' guilt [R. 47] and the second result, conviction, was the subject matter of the editorial in question. The Times considered that these men were in the same general class with Dave Beck, the "virtual political and industrial dictator of the Puget Sound territory" [R. 48]; that lack of official firmness had placed Seattle helplessly under his thumb [R. 48]; that strong methods had saved Portland from like disaster [R. 49]; that success of Dave Beck or of sit-strikers in the Los Angeles territory would be destructive of the Times' cardinal tenet, the open shop. And so, although the courts were quite consistently doing their duty in the premises [R. 50-51], the Times considered it appropriate to speak on behalf of the community and to do everything in its power with vigor and determination to resist "attempts to establish *within its sphere of influence* conditions inimical to that policy" of open shop [R. 44]. Desired ends, contumacious or otherwise, may be attained by commendation and flattery as well as criticism and threats. Lest there be any mishap in this case, which was nearing a successful conclusion as to the "ringleaders" and twenty others [R. 47], the Times undertook to voice its sentiments, as those of the community, so that Judge Ambrose, as well as the enforcement officers, would be left in no doubt concerning its opinion of what the ultimate disposition should be.

The editorial [R. 11] points to the assumed importance of the verdict by initially asserting that it "will have reverberations up and down the Pacific Coast and in points further East," thus conveying to the judicial mind the wisdom of proceeding cautiously. The jury's verdict is said to be the reflection of an "aroused" city and a notice "that no kind of union terrorism will be permitted here";

but what will be the temper of this aroused citizenry if the verdict should be set aside and a broad avenue thus opened for sit-down strikes, "Davebeckism" and other forms of "union terrorism,"—in other words, if the labor elements are thus permitted "to establish within its (the Times) sphere of influence conditions inimical to that policy" so ardently advocated by the Times? And what would be the temper of the Times and the community it assumes to represent should the judge grant probation or impose nominal fines as for misdemeanors and thus vacillate upon an issue so dear to the heart of the Times? Would these questions not immediately suggest themselves to the judicial mind upon reading this editorial? If not, certainly they would as the reading progressed and as the two final paragraphs were reached.

The Secretary of Labor was then defending the sit-strike [R. 47] and many persons honestly believed in it as a lawful weapon of industrial warfare; the matter was open until this court decided *National Labor R. Bd. v. Fansteel Met. Corp.* on February 27, 1939 (306 U. S. 240). But the Times undertook on December 21, 1937, to tell the judge in the *Busick* case that the sit-strike was an "assault on the Douglas plant" and was "union terrorism and racketeering" and "union lawlessness." The district attorney's appraisal of the verdict as one of the "most far-reaching verdicts in the history of this country" is asserted to be correct because, as the Times says, "for the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime." The jury has now done its duty; it has established a landmark in a new field of law, one of such importance that the judge who would overthrow it might

well deem himself to be bringing down upon his head the wrath of an "aroused" citizenry as well as repeated objurgations and ultimate political opposition of the Los Angeles Times.

> "Government may have broken down in other localities; whole States may have yielded to anarchy. But Los Angeles county stands firm; it has officers *who can do their duty* and *courts* and juries *which can function.*
>
> "*So long as that is the case,* davebeckism cannot and will not get control here; nor johnlewisism either."

Here is commendation indeed for the judge who has guided the jury's deliberations to a proper conclusion. And here in no uncertain terms is a warning to that same judge of what will be the general reaction, and more particularly the Los Angeles Times' reaction, to any orders setting aside the verdict, granting probation to defendants or otherwise failing to follow with firmness and vigor the conviction so justly reached by the jury's wise deliberations.

Judge Wilson said:

> "The language of the editorial as a whole was a suggestion to the court that no leniency be shown to the defendants. What would be expected, after reading the article, except condemnation of the judge if he deemed it legally necessary to grant a new trial or if he granted probation?" [R. 111.]

And the Supreme Court:

> "It cannot reasonably be said that they would have no tendency to influence the trial judge in rendering the

judgment, or in ruling upon the other matters that in the regular order of the proceedings in criminal matters would come before him in the case then pending. The editorial may not have been intended, but it is capable of being construed, as a notice to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that should the court act contrary to the suggestions contained in the editorial, it might well expect adverse criticism in the columns of The Times. Viewing the editorial in the light of these considerations, we are satisfied that its reasonable tendency was to interfere with the ordinary administration of justice by the court in the action then pending before it." [R. 128.]

These conclusions of the triers of the facts form a strange background for Mr. Hanson's assertion that this particular editorial "represents an irreducible minimum of the kind of comment without which a newspaper cannot perform its function as a molder of community opinion" (p. 8).

Petitioners' Attempted Defense of This Editorial.

In defense of this editorial petitioners rely upon the fact that the publication was made after verdict. But the Supreme Court authoritatively ruled[1] [R. 125] that the cause was still pending [see also Judge Wilson's holding at R. 109].

Petitioners likewise advance this argument:

"The attitude of the Times toward the open shop and its inflexible opposition to the closed shop and

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[1] *Minnesota ex rel. Pearson v. Probate Court*, 84 L. Ed. (Adv. Op.) at 479.

> the sit-down strike was well known, and this editorial was but a reiteration of its frequently announced views on such matters [R. 43-48]." (Petn. p. 11.)

The inference is that the judge already knew these things and hence "the opinion appeared where all could know the attitude of the paper" (p. 17),—this "molder of community opinion" (Hanson, p. 8).

Judge Wilson aptly said in connection with the probation editorial:

> "It is of no consequence that this editorial, as argued by counsel for respondents, merely expressed the attitude which the Los Angeles Times had maintained for more than fifty years toward those who committed violence during labor disputes. Even if such attitude had been well known in this community for the period mentioned that fact did not excuse the language addressed directly to the judge telling him in few but expressive words how he should deal with the convicted defendants." [R. 116.]

"Probation for Gorillas".

Matthew Shannon and Kennan Holmes were convicted of assault with a deadly weapon and conspiracy to commit that crime. This was on April 22, 1938; defendants then made application for probation, which on May 2, 1938, was set for hearing on June 7, 1938, said date being also the time fixed for sentencing defendants [R. 23]. The editorial [R. 23] was published on May 5, 1938.

The judge in charge of the sentencing of the sit-strikers had been rather lenient; not one of them had gone to jail, much less the penitentiary [Chandler affidavit, R. 47]. The Times determined that this thing should not happen

again, nor anything resembling it. So the editorial director instructed his assistant to prepare an editorial on the subject.

> "I told him in substance and effect that I did not believe probation should be granted and I thought we should vigorously oppose it." [R. 72-3.]

Harry Chandler described it as "an editorial vigorously opposing the granting of probation," and further said:

> "In this editorial it said in effect that, in the interests of society and of community safety, men who co[illegible] terrorism, particularly when for pay, should be severely punished." [R. 52.]

The Times here indulged in its inimitable free style of comment. The defendants were characterized as members of a "wrecking crew" or "goon squad," as "gorillas," "sluggers for pay," committing "mayhem for wages," each of whom "hires out his muscles * * * in aid of a racket," "a deliberate foe of organized society," "thugs" [R. 23].

> "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument" (Cantwell v. State of Conn., No. 632, decided May 20, 1940).

The editorial not only calls for severe punishment, it in effect specifies the kind and quantum, namely, an indeterminate assignment to the jute mill at San Quentin [R. 24]. It will be noted that the count charging assault with a deadly weapon involves the exercise of judicial discretion as to whether the punishment shall be that of penitentiary

for not over ten years or of county jail not exceeding one year, or merely a fine, or a fine and imprisonment (Pen. C., Sec. 245); while the conspiracy count connotes an exercise of the discretion mentioned in sections 182 and 17 as to whether the conspiracy be treated as a felony or misdemeanor. The Times demands that both be treated as felonies with San Quentin as the place of imprisonment, and hence we have involved not only an address to the judge concerning probation, but also one concerning the quantum of punishment to be administered upon denial of probation.

Again, the time set for sentencing being the time for motion for new trial, the court would then be called upon to determine whether it should be granted upon either count; and the fact that defendants not only made such motion but believed themselves entitled to it, is evidenced by the opinion in *People v. Shannon*, 28 Cal. App. (2d) 677, which shows that an appeal was taken from the order denying a new trial. We have an editorial designed to coerce judicial action in the matter of passing on motion for new trial, denying probation, sentencing defendants as felons and, of course, determining whether the sentences should run concurrently or consecutively. All these things are embraced within the instant editorial and the point was emphasized by the Supreme Court at R. 133.

Lest there be any doubt in the matter, the trial judge is addressed by name, and it so happens that he had never before been *elected* to the Superior Court and would be required, if desirous of continuing in office, to submit to the will of the electorate in the approaching August primary, an electorate consisting of some 1,250,000 voters. (Popular conception is that they can best be reached through favorable newspaper publicity.) He is warned

against making "a serious mistake" and is advised that the "community needs the example of their assignment to the jute mill." Any one situated as he was, knowing of the fixed policy of the Times in labor matters, of its "vigor and determination" in opposing all opposition to the "open shop" policy, and, noting the intemperate language of the editorial, could not well escape the inference that unfavorable action on his part would meet with some sort of retribution, probably political, at the hands of the Times.

Nothing less than a startling newspaper solidarity—a slogan of one for all and all for one—could have produced Mr. Hanson's claim that this "editorial is a proper exercise of the function of the press * * *." This is the editorial which Mr. Cosgrove practically admitted to be contemptuous [R. 87] and on which the Times made "no serious defense" in the Supreme Court, because "little * * * can be said in defense of the publication" [R. 131]

Petitioners' Attempted Defense.

Petitioners' brief (p. 12) attempts to justify this editorial upon the ground of custom. But the claimed custom is shown by R. 52 and by the Yoakum affidavit [R. 53-55] to be one of furnishing facts and opinions to the probation officers, not to the judges themselves; the probation department is required to make an investigation and report the facts, together with its own recommendations as to granting or denying probation (Pen. C., Sec. 1203); but it is not required nor expected to submit the opinions of other persons; this will be apparent from our later discussion of the statutory provisions. But if the custom were that suggested by petitioner, it would be a custom to commit contempt and no such "custom" could justify any particular offense.

The statutes plainly forbid extra-mural expression to the judge of opinions upon the granting or denying of probation. As we have said, the investigation and report is to be made by the probation officer (Pen. C., Sec. 1203). That section shows that his investigation relates to matters to be considered "either in aggravation or mitigation of punishment." Section 1204, relating to facts in mitigation, says:

> "The circumstances must be presented by the testimony of w....esses examined in open court * * *. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section."—

which is a reference back to section 1203. Section 166, subd. 8, enumerates, as one of the "kinds" of *contempts* which constitute a misdemeanor, this very type of activity:

> "8. Presenting to any court having power to pass sentence upon any prisoner under conviction, or to any member of such court, any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this code."

This matter was authoritatively settled adversely to petitioners' contention by the Supreme Court decision [R. 132]; even if certiorari were granted, this construction of the state statute would be accepted as conclusive.[1]

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[1] *Minnesota ex rel. Pearson v. Probate Court*, 84 L. Ed. (Adv. Op.) at 479.

Petitioners' attempt (p. 12) to rely upon a casual remark of an unnamed presiding judge meets with adequate treatment in the Supreme Court opinion at R. 132. The court said in part:

> "If this advice could be construed as permitting the publication of an editorial like that entitled, 'Probation for Gorillas?' then the same right should be accorded to those newspapers favoring the probation of these same defendants referred to in the editorial. We would then have the deplorable situation of a heated newspaper controversy being carried on in the community while the question of probation was before the court for determination. That such a situation would contribute to the orderly administration of justice, we think no one would contend." [R. 132.]

The Fall of an Ex-Queen.

Erwin P. Werner and Helen M. Werner were tried on two charges,—attempt to commit grand theft, a felony (Pen. C., Secs. 484, 487, 489, 664), and violation of Penal Code section 653f, soliciting another to offer or join in an offer of a bribe, which last mentioned offense is punishable by imprisonment in the county jail for not over one year or in the State Penitentiary for not over five years, or by fine of not over $5,000.00. They were convicted on both counts on April 12, 1938, and gave immediate notice of motion for new trial; the hearing of said motion and the matter of sentencing said defendants were set for April 22, 1938 [R. 17]. On that date the court, through Judge Ambrose, would be required to exercise discretion in the following respects: (a) passing upon motion for new trial, which would of course involve determination of sufficiency of the evidence, of the exist-

ence and magnitude of errors, and of whether defendants were properly charged with two offenses rather than one, concerning which last mentioned matter see reversal in *People v. Werner*, 29 Cal. App. (2d) 126; (b) ruling upon application for probation; (c) determining the nature and amount of punishment for the conviction under section 653f; and (d) adjudging that the sentences upon the two counts be made to run consecutively or concurrently.

The editorial "The Fall of An Ex-Queen" [R. 17] was published on April 14th, while all these matters were pending and undecided. The Times having taken to itself the function of speaking for the community in labor matters, now undertakes to perform that function in other types of pending litigation. There was only one man who could properly make the decision and that was the trial judge, who, as shown by the above quotation from the Werner record, referred to newspaper articles in the course of his judicial deliberations. Quite obviously, therefore, the anvil was being hammered for his benefit in order that he might do justice according to the views of the Los Angeles Times.

To that end the Times indulged in a dissertation upon the merits of the Werner convictions with particular reference to its justice in the case of the wife [R. 17]. "An address to the public is an address to the court," says Judge Wilson [R. 101].

Politics, it is said, is not only an essentially selfish business but it is conducted "in the main for personal profit of one kind or another" and "When it is of the boss type, it is apt to be pretty sordid as well." For years Mrs. Werner was "the country's only woman boss." And "Success in boss-ship * * * necessarily implies a

kind of moral obliquity if not an actually illegal one." These remarks, applied to Mrs. Werner who is about to move for a new trial or other favorable judicial action, picture her as a pretty sordid figure who has received her just reward. If there be any question about that, the second paragraph of the editorial makes it clear:

> "So that it is something of a *contradiction of sense*, if not of terms, to express regret that the political talents of Mrs. Helen Werner were not directed to other objectives than those which, in the twilight of her active life, have brought her and her husband to disgrace."

In other words, we may say that we are sorry that these things have happened to her, but one cannot truly be so, because Mrs. Werner is possessed of such moral obliquity that it is well that she has devoted herself to sordid activities; she would not have been of use elsewhere, nor would she have succeeded; indeed, with her mental outlook, she would have been more a detriment to the public in other lines of activity. We again quote:

> "If they (her talents) had been, she would not have been in politics at all and probably would never have been heard of in a public way. Her natural flair was purely political; she would have been miscast in any other sphere of activity."

The woman who has just been convicted, who will apply for a new trial, who must be sentenced, who may possibly apply for or be granted probation, is a sordid woman possessed of moral obliquity, whose talents were directed toward personal profit to the inevitable detriment of the

public. To prove that she is sordid, we need but point to the fact that:

> "In her heyday she had a finger in every political pie and many were the *plums* she was able to extract therefrom for those *who played ball with her.* From small beginnings she utilized every opportunity to extend her influence and to put officeholders and promising political material under obligations to her."

Then came the inevitable turn of the political wheel, she found her grip slipping and it was hard to take, as a result of which:

> "The several cases which in recent years have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her onetime influence in high places."

Judge Wilson could judicially notice the fact, which all the public knew, that Mrs. Werner had not been convicted in a single one of "the several cases" to which reference is here made; but they are referred to as examples of the thing which ultimately led to her conviction in the case in which she was about to move for a new trial; the plain implication is that she was guilty in those other cases and that the instant case is but one of a number of like examples "of an energetic effort to regain and reassert her onetime influence in high places." That this is the meaning is apparent from the sentence which immediately follows: "That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical." In other words, the conviction of this sordid political figure, dealing constantly in political plums, and grasping for

more of the same sort of personal profit as her sun is sinking, is not only guilty of the charges upon which convicted, but also guilty of the other charges on which formerly tried; that they are all of one piece, and the logic of the situation is that sooner or later her guilt should have been proved on her as in the instant case.

Counsel for petitioners assert that:

> "The language was 'temperate and considerate' and 'free of any abusive or immoderate language' * * * nor did it contain any suggestion respecting court proceedings." (p. 12.)

But the Supreme Court said:

> "With this knowledge before them, they prepared and published the editorial which it must be conceded was a *scathing denunciation* of Mrs. Werner and a *caustic criticism* of her political activities in recent years. That a publication of this character concerning a person convicted by the verdict of a jury, and who was soon to appear for sentence, would have a disturbing effect upon the judge before whom the case was pending when the time came for pronouncing judgment, we think can *neither be questioned nor denied.*" [R. 130.]

The Supreme Court, summarizing its rulings, said of the three editorials:

> "In the present case the detriment caused by the publication of said editorials was the *probable denial of a fair trial* to the litigants in the actions then pending before the courts which were the subject of said editorials." [R. 138.]

II.

The Instant Petition Presents No Federal Question.

What Constitutes Contempt Is a Matter of Local Law.

The California Constitution provides in section 9, Article I:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right;* and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *"

The California courts found upon the facts presented that there had been *abuses of that right* by petitioners.

The ultimate and essential claim of petitioners is that fundamental rights have been denied them by holdings of two state courts that the facts at bar measure up to the standard of contempt which has been announced, accepted and applied as the state law for many years past,[1]—a criterion which corresponds to the one heretofore adopted by this court.[2] And petitioners would have this court first reverse itself and then hold that the state court had denied due process or equal protection of the laws[3] because it

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[1]*In re San Francisco Chronicle*, 1 Cal. (2d) 630, 637; *In re Shuler*, 210 Cal. 377, 402; *In re Lindsley*, 75 Cal. App. 122, 124; *Lindsley v. Superior Court*, 76 Cal. App. 419, 428.

[2]*Toledo Newspaper Co. v. U. S.*, 247 U. S. 402, 421; *Near v. State of Minnesota*, 283 U. S. 697, 715; *Sinclair v. U. S.*, 279 U. S. 749, 764.

[3]It is the Fourteenth Amendment, not the First, that affords protection against state denial of freedom of the press or freedom of speech. *Near v. Minnesota*, 283 U. S. 697, 707.

applied the standard of guilt which has prevailed in the California courts and in the United States tribunals since the formation of the state and federal governments, respectively.

This contention, for several reasons, presents no federal question of any substantiality. In the first place it ignores the sovereign power of the state and the restricted nature of the grant of powers to the United States. It is well settled that each state may set up its own body of jurisprudence, whether it be the civil law, the common law, or a hybrid form such as is exemplified by the community property system in the common law state of California.[1] In *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, this court recently said:

> "And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

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[1]See *Missouri v. Lewis*, 101 U. S. 22, 31; dissent of Mr. Justice Brandeis in *Truax v. Corrigan*, 257 U. S. at 372-74.

And, quoting Mr. Justice Holmes:

> " 'The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * *
>
> " '* * * the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.' "

The state may define crimes or lawful conduct as it sees fit.[1]

The powers of its own courts are within its exclusive keeping, not subject to federal control.[2]

The substantive law of the state is binding upon this court in all types of cases, subject only to the narrow exception of "matters governed by the federal Constitution or by acts of Congress."[3]

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[1]See *Sheedin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 67-69; *Powell v. Pennsylvania*, 127 U. S. 678.

[2]*Missouri v. Lewis*, 101 U. S. 22; *Cincinnati Street Railway Co. v. Snell*, 193 U. S. 30, 36; *Tumey v. State of Ohio*, 273 U. S. 510, 534; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517; *Truax v. Corrigan*, 257 U. S. at 373-4, dissenting opinion.

[3]*Erie R. Co. v. Tompkins*, 304 U. S. at 78.

Application of Fourteenth Amendment to Contempt.

For the purposes of this case, the only limitation upon the foregoing propositions is the requirement that due process of law or equal protection of the laws must not be denied. But "the 14th amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions * * * any more than, in guaranteeing due process, it assures immunity from judicial error * * *." (*Milwaukee, etc. Co. v. Wisconsin ex rel. Milwaukee*, 252 U. S. at 106.)[1]

To determine what is due process in contempt proceedings we must look, of course, to the standards which were recognized at the time of adoption of the federal Constitution.[2] Such investigation discloses that, as the power is an inherent one, necessary to the independence of each court,[3] *the demands of due process are met by adequate notice of hearing and opportunity to be heard*,[4] both of which requisites were manifestly present here.

Two years of litigation with extensive argument and reargument upon the law, trial had upon issues carefully drawn and upon oral evidence taken in open court, with favorable rulings of the trial court upon two counts out of

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[1]See, also, *Riley v. Worcester County Trust Co.*, 89 Fed. (2d) 59, 66.

[2]*Eilenbecker v. District Court*, 134 U. S. 31, 38; *Tumey v. State of Ohio*, 273 U. S. at 523.

[3]*Michaelson v. U. S.*, 266 U. S. 42, 65; *Myers v. U. S.*, 264 U. S. 95, 103; *Ex parte Robinson*, 86 U. S. 505, 510.

[4]*Cooke v. U. S.*, 267 U. S. 517, 537; *Blackmer v. U. S.*, 284 U. S. 421, 440; *Eilenbecker v. District Court*, 134 U. S. 31, 39; *Ex parte Savin*, 131 U. S. 267, 278; *U. S. v. Moore*, 287 Fed. 879, 883, certiorari denied in 264 U. S. 581.

seven and like rulings by the Supreme Court upon two additional counts, would seem to fill the prescribed measure to the brim.

Even if it were to be conceded that there was error in the application of the state law to the facts at bar, that would not raise a constitutional question for, as said in the *Milwaukee* case, *supra*, the 14th Amendment does not "assure uniformity of judicial decisions" or "immunity from judicial error."

Bell Telephone Co. v. Pennsylvania P. U. Commission, 84 L. Ed. (Adv. Op.) 412:

> "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of the state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

Patterson v. Colorado Is Controlling.

The question now presented—whether a finding of contempt of the state court presents a federal question—was specifically decided by this court in *Patterson v. Colorado*, 205 U. S. 454. That case dealt with a contempt by publication in a newspaper. A writ of error to review the conviction in the state court was dismissed for want of jurisdiction, this court speaking through Mr. Justice Holmes. The decision proceeded upon the postulate that

"The only question for this court is the power of the state" (p. 460); and the court said in part:

> "There is no constitutional right to have all general propositions of law once adopted remain unchanged. * * * in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.
>
> "It is argued that the articles did not constitute a contempt. * * * However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of *as an arbitrary pretense for an arbitrary punishment*. Supposing that such a case would give the plaintiff in error a standing here, *anything short of that is for the state court to decide. What constitutes contempt*, as well as the time during which it may be committed, *is a matter of local law*."

Again at page 463:

> "It only remains to add that the plaintiff in error had his day in court and opportunity to be heard. We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States, or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this court."

To the same effect see:

Newport Light Co. v. City of Newport, 151 U. S. 527;

Owen v. Dancy, 36 Fed. (2d) 882, 884;

Gasquet v. Lapeyre, 242 U. S. 367, 369.

Finality of Contempt Judgment Is Essential to Independence of Contemned Court.

And the *Patterson* decision is obviously sound for a certiorari would first review the findings of the state courts upon questions of fact and state law and, if decided favorably to petitioner, would impose upon them the judgment of this tribunal as to what constitutes contempt of the courts created by and functioning under the laws of the sovereign state of California,—thus impairing their inherent power and duty of self-protection.

Ex parte Kearney, 7 Wheat. 38, 44:

> "The sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interfering to each respective court. Infinite confusion and disorder would follow if courts could, by writs of habeas corpus, examine and determine the contempt of others."

Ex parte Fisk, 113 U. S. 713, 718:

> "There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error, or appeal to this court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.

"This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

Re Debs, 158 U. S. 564, 595:

"And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

And this is the law in California. An adjudication of contempt is reviewable in an appellate court only to the extent of determining whether the evidence supporting the judgment is sufficiently substantial to sustain the jurisdictional finding [see R. 134].

Whether the Superior Court of Los Angeles County and the Supreme Court of California have misapplied the law to the facts is not for this court to say, for that is not a federal question.

III.

The "Clear and Present Danger" Doctrine Is Not Applicable to Contempt.

Even if this court could properly review the intrinsic merit of the state law of contempt and, through reversing itself, impose a new law upon the state of California, there would be no good ground for so doing.

There Is a Manifest Distinction Between Abridging Free Speech and Punishing Its Abuse.

The cases upon which petitioners rely[1] are in no instance concerned with contempt of court. They deal with statutory *abridgments* of free speech, not with subsequent punishments for *abuses* of that right, such as the recognized instances of libel, slander and contempt.

The basic conception that "Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse,"[2] is implicit in all of the "clear and present danger" pronouncements.

See:

Gitlow v. New York, 268 U. S. at 666;

Whitney v. California, 274 U. S. at 373 (concurring opinion of Mr. Justice Brandeis);

Schenck v. United States, 249 U. S. at 52 (Mr. Justice Holmes);

Cantwell v. State of Connecticut (No. 632, decided May 20, 1940).

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[1]*Whitney v. California*, 274 U. S. 357; *Herndon v. Lowry*, 301 U. S. 242; *Lovell v. Griffin*, 303 U. S. 444; *Schneider v. New Jersey*, 308 U. S. 147; *Thornhill v. Alabama*, 84 L. Ed. (Adv. Op.) 659; *Carlson v. California*, 84 L. Ed. (Adv. Op.) 671; *Grosjean v. Amer. Press Co.*, 297 U. S. 233.

[2]*Near v. State of Minnesota*, 238 U. S. at 708.

The Clear and Present Danger Doctrine Was Not Designed for Application to Contempt.

Petitioners make no claim that the doctrine now advocated has been applied by this court to contempt proceedings. And it is significant that the justices who evolved and insisted upon its application to abridgements of free expression of political or economic views (the field delimited for such free discussion by the recent *Thornhill* case) made no attempt to extend the doctrine to contempt proceedings but actually joined in decisions which, by adopting the reasonable tendency standard, operated to exclude it.

Toledo Newspaper Co. v. United States, 247 U. S. 402, was decided in 1918, and, in the face of a dissent by Mr. Justice Holmes and Mr. Justice Brandeis, it adopted and applied the reasonable tendency test. The dissenting justices made no attempt to inject the clear and present danger doctrine, and contented themselves with a discussion of the proper construction of the pertinent federal statute. This new doctrine was first brought forward in the *Schenck* case (249 U. S. 52) decided at the next term. Although one or both of these justices pressed the doctrine for application in the *Abrams*, *Gitlow* and *Whitney* cases (decided in 1919, 1925, and 1927, respectively), they concurred in the unanimous decision of *Sinclair v. United States*, 279 U. S. 749 (decided in 1929), which again reiterated and applied to a contempt proceeding the *Toledo Newspaper Co.* rule that "the situation is controlled by the reasonable tendencies of the acts done and not by

extreme and substantially impossible assumptions on the subject," which rule is again phrased at page 764 as follows:

> "But here again not the influence upon the mind of the particular judge is the criterion, but *the reasonable tendency of the acts done to influence* or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case."

This doctrine was adopted at the instance of Mr. Justice Roberts, who then appeared as counsel for the United States and successfully urged the affirmance of the conviction, relying largely upon the *Toledo Newspaper Company* case.

Moreover, Mr. Justice Roberts, who spoke for the court in applying the clear and present danger rule in *Herndon v. Lowry*, delivered at the same term the opinion in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 131-133, wherein he rejected the contention that the National Labor Relations Act as applied to the Associated Press was in restraint of freedom of the press, and used the language which we have quoted, *supra*. In support of that statement there is cited only the case of *Toledo Newspaper Co. v. United States*. And Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo joined in forming a majority of the court in that instance.

The True Purport of the Doctrine.

The clear and present danger doctrine, as stated from time to time, has called for an imminent danger of overthrow of organized government. See, for instance, Mr. Justice Holmes' dissent in the *Abrams* case, 250 U. S. at 630; the concurrence of Mr. Justice Holmes and Mr. Justice Brandeis in *Gitlow v. New York*, 268 U. S. at 673. If the doctrine were applied in this extreme sense to contempt proceedings it would result absurdly, for successful influence of one judge or two judges or a dozen judges would have no direct and immediate tendency to destroy the government as a whole. Judge Wilson well said:

> "The application of this doctrine to contempt proceedings would mean that an unsuccessful attempt to influence the court would not be punishable, that only the one who prevailed in his effort would be in contempt. It would also mean that one contempt, or possibly two or more, would of necessity be passed by as unimportant, that the court could act only after so many contempts had been committed that the courts and the government would have been undermined, by which time there would have been so great a popular uprising as to change the form of government, whereupon there would be no courts and therefore no contempt." [R. 106.]

The Doctrine, as Advanced by Petitioners, Is Not Essentially Different From the Reasonable Tendency Rule.

Petitioners do not rely upon the extreme statement of the doctrine. They rest upon Mr. Justice Brandeis' statement in the *Whitney* case:

> "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent

> danger of some substantive evil which the state constitutionally may seek to prevent has been settled." (Petitioners' Br. p. 17.)

And petitioners' brief shows that the doctrine as applied to contempt distills itself into the same thing as the reasonable tendency doctrine against which counsel for petitioners inveigh.

Under this statement of the rule there is necessary to lawful restraint of speech only "a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent." And petitioners (at p. 18) concede that "danger to the orderly administration of justice," if clear and imminent, would measure up to the standard which they advocate. The *Toledo* case holds in no uncertain terms that publications tending to influence the court in pending matters do endanger, do in fact obstruct, the orderly administration of justice; and interference with that orderly administration is, in petitioners' own conception of the matter, an evil against which the state, through its courts, may protect itself.

Mr. Wirin, *amicus curiae* herein, who represented Harry Bridges upon his application, No. 759, said in that petition (pp. 14-15), that "the courts have the authority and the obligation to safeguard themselves from * * * outside influences concerning pending cases"; and that "interferences with the judiciary admittedly constitute 'substantive evils which the courts may constitutionally penalize." Clearly, then (according to the Wirin argument), protection against "outside influences concerning pending cases" is the thing against which the state, through its courts, may protect itself whenever there appears "a clear and imminent danger" of such influences

being brought to bear upon such pending cases. If this were not so, "We would then have the deplorable situation of a heated newspaper controversy being carried on in the community while the question * * * was before the court for determination. That such a situation would contribute to the orderly administration of justice, we think no one would contend" [Supreme Ct., R. 132].

It is also interesting to note that the *amicus curiae* brief of American Civil Liberties Union in the *Bridges* case suggests that the appropriate criterion is "a *reasonable apprehension* that the independence of the judiciary was being challenged by the comment complained of" (p 4) and that "it should be necessary to find a *strong probability* that interference would result from the act charged before punishment is meted out" (p. 4). Commenting upon *Craig v. Hecht,* 263 U. S. 255, it is further said, in effect, at page 6, that the court there recognized the impropriety of comment upon pending cases "when it is quite clear that the comment has a *direct tendency* to obstruct."

All counsel who advocate the danger doctrine find difficulty in formulating it so as to exclude "tendency to influence" as the essential element.

Either Doctrine Presents a Mere Question of Fact.

We have then a question of fact as to whether "a clear and imminent danger" of influencing the court exists, as opposed to a question of fact whether the extraneous influence has a "reasonable tendency" to effect that result.

The court said in *Schaefer v. United States,* 251 U. S. at 474: "Free speech is not an absolute right, and when it or any right becomes wrong by excess is somewhat

elusive of definition." Mr. Justice Holmes said in the *Schenck* case: "It is a question of proximity and degree." The court there held that the evidence was sufficient to justify the lower federal court in finding that the defendant's act did create "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" and, in so doing, stressed the "tendency" of the documents in question to influence others to obstruct the recruiting service of the army. (See pp. 51-2.)

Mr. Justice Brandeis, in the *Whitney* case (Mr. Justice Holmes concurring), advocated the application of the clear and present danger doctrine, and said (274 U. S. at 374):

> "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection."

Mr. Justice Brandeis, in a separate opinion in the *Schaefer* case (251 U. S. at 482), said:

> "Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. The question whether, in a particular instance, the words spoken or written fall within the permissible curtailment of free speech, is, under the rule enunciated by this court, one of degree. And because it is a question of degree, the field in which the jury may exercise its judgment is, necessarily, a

wide one. But its field is not unlimited. The trial provided for is one by judge *and* jury; and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error." (Italics by the court.)

As the same justice pointed out in the *Whitney* case, there is no fixed standard for determination of the existence of "a clear and imminent danger" and the matter must be determined as one of fact in the trial court. In that instance the concurring justices held that, notwithstanding the erroneous reasoning of the trial judge, his ultimate finding was sustained by competent evidence and, hence, should be affirmed. At pages 378-9 it was said:

> "Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."

And:

> "On the other hand, there was evidence on which the court or jury might have found that such danger existed. * * * In the present case, however, there was other testimony which *tended* to establish

> the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed."

Whether we apply the test of reasonable tendency to interfere with judicial proceedings or clear and imminent danger of interference therewith, we have a question of fact presented in each contempt proceeding, and it is competent for the court to conclude that a publication which has the specified tendency also presents clear and imminent danger "of some substantive evil which the state constitutionally may seek to prevent". As applied to contempt, petitioners' clear and present danger doctrine possesses nothing of substance different from the criterion laid down in the *Toledo Newspaper* case, the *Sinclair* case, and in the State of California.[1]

The meaning of each editorial at bar presents only a question of fact whose final solution rests with the trial judge if the inferences drawn by him are reasonable.[2]

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[1]*In re Shuler*, 210 Cal. 377, 402; *In re San Francisco Chronicle*, 1 Cal. (2d) 630, 637.

[2]*In re Hallinan*, 126 Cal. App. 121; *Lindsley v. Superior Court*, 76 Cal. App. 419, 430; *Rose v. Superior Court*, 140 Cal. App. 418, 424; *Daily v. Superior Court*, 4 Cal. App. (2d) 127, 134; *In re Reilly*, 17 Cal. App. (2d) 55, 60.

And it was so held below [R. 134]. The Supreme Court sustained Judge Wilson's factual deductions, and it seems impossible to arrive at the conclusion that this was not the exercise of calm, reasonable and good judgment, the test suggested by the *Schaefer* case.

The existence of imminent danger "to the orderly administration of justice" is inherent in the findings of Judge Wilson [R. 60] and of the Supreme Court concerning each of the three editorials. As to the "Sit-Strikers Convicted", see R. 109-111, 127-128; as to "The Fall of an Ex-Queen", see R. 112-113, 130; and "Probation for Gorillas?", R. 115-116, 131-134.

Herndon v. Lowry Does Not Support Petitioners' Position.

The claim that the reasonable tendency doctrine was rejected by *Herndon v. Lowry*[1] as too vague a criterion of guilt is not well founded. What was there said related to an argument of counsel that "reasonable tendency" should be read into the vague statute under consideration, which had been so construed by the state court as to set at large the objective of the "dangerous tendency" suggested by counsel. At page 256 the court stressed the fact that "The legislation under review differs radically from the espionage acts in that it does not deal with a wilful attempt to obstruct a described and defined activity of the government." In view of the state court's construction of the statute it further said, at page 261:

> "The Act does not prohibit incitement to violent interference with any given activity or operation of the state. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the

[1]301 U. S. 242.

circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. Nor is any specified conduct or utterance of the accused made an offense."[1]

Reasonable Tendency Is a Common Law Standard, Not a Newly Created Criterion of Guilt.

More important, however, is the fact that the court was discussing legislation which provided a new measure of guilt and not one which incorporated a recognized common law standard of conduct. The decision differentiates such cases as *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, and *Nash v. U. S.*, 229 U. S. 373, saying:

> "The decisions relied on by the state held the Sherman law furnished a reasonable standard of guilt because it made a standard long recognized by the common law the statutory test." (page 263.)

And reliance was placed upon *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81, wherein the court, at page 92, said:

> "Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them."

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[1]As to the true purport of this decision see next to last paragraph of *Cantwell v. State of Connecticut* (No. 632, decided May 20, 1940).

The Cohen decision cited, among others, *International Harvester Co. v. Kentucky*, 234 U. S. 216. Mr. Justice Holmes, speaking for the court in that instance, said, at page 223:

> "We regard this decision as consistent with Nash v. United States, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe."

The distinction between new statutory tests and settled common law criteria was again drawn by Mr. Chief Justice Taft in *Cline v. Frink Dairy Co.*, 274 U. S. 445, 459. He said:

> "'The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the deci-

sions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502, 69 L. ed. 402, 407, 45 Sup. Ct. Rep. 141; Omaechevarria v. Idaho, 246 U. S. 343, 348, 62 L. ed. 763, 767, 38 Sup. Ct. Rep. 323, *or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ.* Nash v. United States, 229 U. S. 373, 376, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; International Harvester Co. v. Kentucky, 234 U. S. 223, 58 L. ed. 1288, 34 Sup. Ct. Rep. 853, or, as broadly stated by Mr. Chief Justice White in United States v. L. Cohen Grocery Co., 255 U. S. 81, 92, 65 L. ed. 516, 522, 14 A. L. R. 1045, 41 Sup. Ct. Rep. 298, "that for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." ' "

The reasonable tendency test is the ancient common law standard applicable to contempt of court and, to quote the *International Harvester* case, "a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe." The *Herndon* case, dealing with a statutory definition of guilt, does not support petitioner's contention that reasonable tendency to influence the court is not the proper

test of unlawfulness of utterances concerning pending causes.[1]

And it should not be forgotten that whatever may be the accepted test of guilt, the existence of a clear and present danger is a question of fact just as is the claim of a reasonable tendency to influence the court. The one test is as flexible as the other and the question always one of fact, as recognized in the concurring opinion in the *Whitney* case.

Fox v. Washington, 236 U. S. 273, emphasizes this consideration. It first found the criterion of guilt to be sufficiently definite, and then pointed (a) to the necessity of limiting the review to the case in hand and (b) to the impropriety of embarking upon a general survey of suppositious situations suggested by counsel for petitioners. "If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness." And so at bar, if reasonable inferences from the editorials in question warrant the conclusion that they possessed an inherent tendency to embarrass or disturb the judge in his deliberations or to actually influence his decision, consciously or unconsciously, in a given direction, that situation spells a contempt of court whether we call the test reasonable tendency or clear and present danger. Under these circumstances, both tests come down to the same thing, namely, an unlawful permeating of the judicial chambers with extramural influences.

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[1]See, in this connection, *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 84 L. Ed. (Adv. Op.) 477, 479-480.

The "Actual Obstruction" Principle.

Mr. Wirin, in his *amicus curiae* brief, advocates adoption of the test of "actual obstruction." As the phrase is there used, it seems to connote a communication tending to influence and actually exercising an influence upon the court. This is deducible from the quotations from *State v. American News Company*, 64 S. D. 385,[1] and *Nixon v. State*, 207 Ind. 426.

In this sense it may be said that Mr. Justice Holmes contended for "actual obstruction" in his dissent in the *Toledo Newspaper Company* case, but *only* as applied to the construction of the statute under consideration. For the learned Justice cautioned that, "I am not considering whether there was a technical contempt at common law, but whether what was done falls within the words of an act intended and admitted to limit the power of the courts" (p. 424). He was discussing an act which said that the contempt power of courts should "not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." He thought the language of the statute "too plain to be construed away" and that the phrase "so near as to obstruct" meant "so near as actually to obstruct—and not merely near enough to

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[1]See Judge Wilson's discussion of this case at R. 106-7.

threaten a possible obstruction." And because he thought a United States judge should "be a man of ordinary firmness of character," he found it "impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty." But the majority of the court differed with him and held that the publication in the neighborhood of the court of articles *having a reasonable tendency to influence* the deliberations of the judge *constituted an actual obstruction* of the administration of justice; that "The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty" (p. 419). Again at page 421:

> "But here again, not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice, and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

That the learned Justice abandoned this viewpoint appears from his discussion of the clear and present danger doctrine in the *Schenck* case,[1] where he said:

> "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime."

The fact is also evidenced by his concurring in the *Sinclair* opinion,[2] which reiterated the language just quoted from the *Toledo* case.

The distinction between tendency to influence and fact of influence is so evanescent as often to be indiscernible. The California Supreme Court in *In re San Francisco Chronicle*, 1 Cal. (2d) at 637, quoted with approval from *People v. Wilson*, 64 Ill. 195, as follows:

> "'A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? *Can it even be certain in regard to itself?* Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on

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[1]249 U. S. at 52.

[2]279 U. S. at 749.

> one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless *a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.'* "

As a practical matter, the fact or extent of actual operation of extraneous influence upon the judicial mind is never susceptible of proof.

Judge Wilson further explained the impossibility of recognizing the "actual obstruction" doctrine when he said at R. 108:

> "If the courts are not permitted to try cases and render judgments impartially and without pressure either from newspapers, individuals, or groups of individuals, freedom of speech and freedom of publication will soon pass into oblivion. If a newspaper may suggest how a case should be determined, any person or group has the same right to suggest its ideas to the judge. Lawsuits would then be decided, not according to the weight of the evidence, but according to the weight of the influence brought to bear upon the judge, and the newspaper itself would be the victim if it had less influence than the opposing group."

See similar remarks of Supreme Court at R. 132.

Conclusion.

We submit, without further elaboration, that this court, if it undertook a review of this case, would find no constitutional question present, for the evidence and the reasonable inferences therefrom abundantly support the findings of fact of the trial court, which were approved by the Supreme Court of California, and which show contempt of court regardless of the particular test applied.

> "To be effective, judicial administration must not be leaden-footed."[1]

It is submitted that no good ground for certiorari has been shown, and that the writ should be denied.

Respectfully submitted,

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[1]*Cobbledick v. U. S.*, 84 L. Ed. (Adv. Op.) at 525.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 64

[illegible] MIRROR COMPANY, a corporation, and L. D. [illegible],

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 64.

THE TIMES-MIRROR COMPANY, a corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

This document is submitted as a supplement to the "Brief for Respondent in Opposition to Petition for Writ of Certiorari", heretofore filed herein, and not as a substitute.

Statement.

The Narrow Issues of the Case.

By their petition, supporting brief and additional brief petitioners have reduced this case to two questions: (1) whether rejection of a "clear and present danger" rule in favor of the "reasonable tendency" criterion is a denial of due process of law or equal protection of the laws; and (2) whether the evidence is sufficient to warrant a holding

that the conviction of petitioners was not merely "an arbitrary pretense for an arbitary punishment" of "innocent conduct" (Mr. Justices Holmes in *Patterson v. Colorado*, 205 U. S. at 460) or, as elsewhere phrased, "mere arbitrary or capricious exercise of power" (*American Ry. Exp. Co. v. Kentucky*, 273 U. S. at 273).[1]

Solemn warnings from counsel supporting petitioners that the freedom of the press must be preserved as a bulwark of our liberties, a defense and an offensive against totalitarianism, do not advance the argument very far. We are still left with the problem of delimiting the bounds of such freedom. Respondent and respondent's counsel[2] are as much interested as petitioners in preserving that right in the sense which is "implicit in the concept of ordered liberty";[3] but to preserve that sort of freedom it is necessary to uphold "the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends", for "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which

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[1]This court will not review the evidence to determine whether it is sufficient to convict under the reasonable tendency rule. That is a state court question upon which the findings below are binding (*Grayson v. Harris*, 267 U. S. 352, 357; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 397). Only in the event of rejection of the reasonable tendency criterion will it become necessary for this court to review the sufficiency of the evidence to determine, as suggested in the petition (p. 5), whether "the 'clear and present danger' test, if applied to the editorials, disclose(s) a legitimate exercise of the right of freedom of speech and of the press." This matter is discussed at pages 49-52, *infra*.

[2]"The earliest record of a local bar association in the field of civil liberties is that of the Committee on Constitutional Rights of the Los Angeles Bar Association. This committee was organized about ten years ago in 1930" (Bill of Rights Review, Vol. I, No. 1, p. 74).

[3]Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. 325.

the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."[4]

All other questions, such as the constitutionality of subdivision 13, Sec. 1209, California Code of Civil Procedure, and the argument based upon Sir John Fox's criticism of the procedural phases of *Rex v. Almon*, have been waived. Review upon *certiorari* is confined to the points raised in the petition.[5]

The Nature of the Freedom Guaranteed to the Press.

Petitioners have not embraced Mr. Justice Edmonds' thesis that contemptuous publications are immune to punishment. They concede that freedom of the press or freedom of speech is not an absolute right or liberty. And counsel concede that their version of the guaranty of a free press "would not justify interference with one judge or one judicial proceeding", further asserting that "All that need appear is that an immediate and serious interference with a court proceeding was advocated or was to be expected" (Petnrs. Br. p. 16).

Thus the process of balancing individual liberties against public interests, the obligation to "reconcile the conflicting claims of liberty and authority"[6] (finding early recognition in *Reynolds v. U. S.*, 98 U. S. 145, and *Davis v. Beason*, 133 U. S. 333, the Mormon Church cases, and continu-

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[4]*Toledo Newspaper Co. v. United States* 247 U. S. 402, 419.

[5]*Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, 604-5; *State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242; *Washington, etc. Co. v. National L. Rel. Bd.*, 301 U. S. 142, 146.

[6]*Minersville School Dist. v. Gobitis*, 84 L. Ed. (Adv. Op.) 993, 994 (not yet published in official reports).

ously pursued by this court),[7] is conceded to be necessary in matters of contempt of court as in other governmental affairs.

The conception of independent courts, uninfluenced by extraneous forces, is so deeply rooted in our constitutional system that a specific guaranty has seldom been deemed necessary;[8] but it is fundamental and is recognized as a public necessity which the guaranty of free speech or freedom of the press cannot be permitted to impair.

Petitioners cite the treatise on "Power of Congress Over Procedure in Criminal Contempts", etc. (37 Harv. L. Rev. 1010), by Professors Frankfurter and Landis. The authors say at page 1020:

> "At the time of the framing of the Constitution, a few basic ideas, more or less definite, had clustered around the very notion of a court. Naturally enough, the Supreme Court, as occasion arose, inferred these ideas from the term 'Courts' and thereby, for practical purposes, wrote them into the Constitution.
>
> "These limiting conceptions may be thus defined: * * * (2) Independence of judgment must be left to the court in cases where it may decide."

Freedom of speech rests on no higher plane than religious liberty, "an interest inferior to none in the

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[7]See *Near v. Minnesota*, 283 U. S. 697, 715; *Schneider v. State*, 308 U. S. 147, 160; *Thornhill v. Alabama*, 310 U. S. 88, 96; *Cantwell v. Connecticut*, 310 U. S. 296, 303-4, 310; and lastly, *Minersville School Dist. v. Gobitis*, 84 L. Ed. (Adv. Op.) 993, 995-6.

[8]It first found expression in Magna Charta, and has been carried into several state constitutions. See 12 *C. J.*, Sec. 1100, p. 1287; 16 *C. J. S.*, Sec. 708b, p. 1492; *State v. Owens*, 125 Okla. 66, 75.

hierarchy of legal values" (*Minersville School District* case, 84 L. Ed. at page 996). The court in the *Minersville* case, by reference to the *Reynolds* decision and other cited authorities, showed that the external exercise of religious liberty has always been required to yield to the demands of public authority reasonably exercised. At page 996, the court further said:

> "In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom."[9]

The introduction to Sir John Fox's excursion into the realms of procedural antiquity in contempt matters (*Fox on Contempt of Court*) says this at page 1:

> "The punishment of contempt is the basis of all legal procedure * * *."

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[9]The California Constitution expressly recognizes the proper limitations of all these fundamental liberties. Sec. 9, Art. I, says: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *" And Sec. 4 of Art. I: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state; * * * but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

And the California Supreme Court:

> "Liberty of the press stops where a further exercise would invade the rights of others. This provision of the Constitution does not authorize a usurpation of the functions of the courts" (*In re Shortridge*, 99 Cal. at 535).

The Circuit Court of Appeals for the Ninth Circuit said:

> "Liberty of the press is subordinate to the independence of the judiciary, and it is not expedient that any class in the community should be privileged to interfere with the rights of litigants or to embarrass or obstruct the administration of justice. 6 R. C. L., 510, Sec. 22." (*In re Independent Publishing Co.*, 240 Fed. 849, 861.)

And this court in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419:

> "2. The asserted inapplicability of the statute under the assumption that the publications complained of related to a matter of public concern and were safeguarded from being made the basis of contempt proceedings by the assuredly secured freedom of the press.
>
> "We might well pass the proposition by because to state it is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity, and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification

> of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing."

Indeed, *amicus curiae* Hanson concedes that "power to punish for contempt by publication" "is entrenched in our jurisprudence as one of the so-called inherent powers of the courts" (Br. p. 6); that a recognition of "the unflinching determination of this Court to condemn every conceivable form of abridgment of the press from any source and by any method" does not connote an assertion "that the constitutional guarantee is so literally absolute as to exempt the press from answerability for abuses to which the general laws apply" (Br. p. 10); and "that the maintenance of an independent judiciary is of equal importance to the maintenance of a free press" (Br. p. 13).

By way of delimiting the bounds of these liberties (freedom of speech and of the press) in their relation to the courts, the common law has long defined as a transgression from exercise to abuse any communication uttered outside a court proceeding under circumstances giving it a reasonable tendency to exercise an influence upon the pending cause over and above that of evidence and argument adduced in open court.

I.

Reasonable Tendency to Influence or Interfere With a Pending Proceeding Is the Only Accepted Criterion.

This test is of indubitable antiquity; it came to us as part of the common law at the formation of the nation. Mr. Chief Justice Hughes, after examining "the historic conception of the liberty of the press", said in *Near v. Minnesota*, 283 U. S. at 715:

> "But it is recognized that punishment for the *abuse*[9a] of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. *There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions.* Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556, 10 Ann Cas. 689; Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. Ed. 1186, 1193, 38 S. Ct. 560."

In addition to the *Patterson* and *Toledo* cases, this statement was fortified by citation of *Huggonson's Case*, 2 Atk. 469, 26 Eng. Rep. 683; *Respublica v. Oswald*, 1 Dall. 319, 1 L. Ed. 155, and numerous early state cases (in footnote 5).

[9a] All italics ours, unless otherwise indicated.

Huggonson's Case (also known as *Roach v. Garvan*) was decided in 1742 and announced the reasonable tendency doctrine. Lord Hardwicke there said in part (p. 683):

> "Lord Chancellor. Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented: nor is there any thing of more pernicious consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard. (*Vide* Baker v. Hart, *post*. 488. Mrs. Farley's case, 2 Ves. 520.)"

At page 685:

> "There may be also contempt of this court, in prejudicing mankind against persons before the cause is heard.
>
> "There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.
>
> * * * * * * * *
>
> "There are several other cases of this kind: one strong instance, where there was nothing reflecting upon the court, is the case of Captain Perry, who printed his brief before the cause came on: the offence did not consist in the printing, for any man may give a printed brief, as well as a written one, to counsel, but the contempt of this court, was prejudicing the world with regard to the merits of the cause before it was heard.
>
> "Upon the whole, there is no doubt, but this is a contempt of the court."

The same doctrine was announced and applied in the *Anonymous Case* reported in 2 Ves. Sen. 520, 28 Eng. Rep. 332, which was decided in 1754, and in *Rex v. Jolliffe*, 4 T. R. 285, 100 Eng. Rep. 1022, decided in 1791. And this is still the law of England.

Rex v. Tibbits, L. R. (1902), 1 K. B. 77, 85-89, reaffirms Lord Hardwicke's opinion in *Huggonson's Case* and says in part (p. 88):

> "It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of Court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place, but it certainly is not confined to such cases. We further think that, if the articles are in the opinion of the jury calculated to interfere with the course of justice or pervert the minds of the magistrate or of the jurors, the persons publishing are criminally responsible: see Reg. v. Grant. (1) We are also of opinion that the fact that Allport and Chappell, the persons referred to, were subsequently convicted can have no weight in the decision of the question now before us. To give effect to such a consideration would involve the consequence that the fact of a conviction, though resulting, either wholly or in part, from the influence upon the minds of the jurors at the trial of such articles as these justifies

> their publication. This is an argument which we need scarcely say reduces the position almost to an absurdity, and, indeed, its chief foundation would appear to be a confusion between the course of justice and the result arrived at. A person accused of crime in this country can properly be convicted in a Court of Justice only upon evidence which is legally admissible and which is adduced at his trial in legal form and shape. Though the accused be really guilty of the offence charged against him; the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilty or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence."

In deciding that the fact of actual influence or obstruction is immaterial, the court reaffirmed the doctrine of *Charlton's Case*, 2 My. & Cr. 342, 40 Eng. Rep. 671 (1837), and *Skipworth's Case*, L. R., 9 Q. B. 230, 235-238 (1873).

Oswald on "Contempt of Court," an English work, says at page 6:

> "To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation"

And at page 92:

> "Generally, comments on a cause, written and published, spoken or threatened, while it is pending, and prejudicing, or calculated to prejudice, any party, and

particularly paragraphs in newspapers having that effect are contempts: but speeches or sermons are equally liable to be punished."[10]

At page 93:

"The question in every case is not whether the publication in fact interferes, but whether it tends to interfere, with the due course of justice."[11]

So much for the English law. The *Respublica case*[12] was decided in 1788; it marked out the pathway which has been constantly followed in the Federal Courts (except as temporarily influenced by the Statute of 1831, which has been codified as 28 U.S.C.A., Sec. 385) and in the courts of the various states.[13] It announced and applied the reasonable tendency test (pp. 326 or 159) which was later so ably stated by Mr. Justice Holmes in *Patterson v. Colorado* as follows:

"In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. *The theory of our system is that the conclusions to be reached in a case will be induced only by evidence*

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[10] The author here cites a long list of English decisions starting with *Huggonson's Case*.

[11] Citing English cases.

[12] 1 Dall. 319, 1 L. Ed. 155.

[13] Except petitioners' case of *State v. American News Co.*, 64 S. D. 385, which is distinctly contrary to the great weight of authority

and argument in open court, and not by any outside influence, whether of private talk or public print.

"What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury, and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, *as tending toward such an interference*, it may punish it as in the instance put. When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."[14]

Amicus curiae Hanson is mistaken in this statement: "Moreover, in *Near v. Minnesota, supra*, this Court consigned to oblivion the Blackstonian theory adopted by Mr. Justice Holmes in the *Patterson* case that freedom of the press does not comprehend immunity from subsequent punishment for harmless publications" (Br. p. 15). Mr. Justice Holmes never embraced any such doctrine. This appears from the portion of the *Patterson* opinion just quoted, and Mr. Justice Holmes conceded the probability of interference by this court whenever the record shows "that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment" (p. 461). He condemned as abuse of liberty publications "tending toward such an interference" with pending proceedings and

[14] 205 U. S. at 462

adhered to this view when joining in the opinion in *Sinclair v. United States*, 279 U. S. 749. The Holmes doctrine is the same as that of the *Near* opinion which, at page 720, said:

> "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

The doctrine of the *Patterson* case was adopted and applied by the court in *Toledo Newspaper Co. v. United States*,[15] wherein it was said:

> "True, it is urged that although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the circumstances which we have stated, in a daily newspaper having a large circulation, as it was not shown that they had been seen by the presiding judge or had been circulated in the court room, they did and could form no basis for an inference of guilt. But the situation is *controlled by the reasonable tendencies of the acts done, and not by extreme and substantially impossible assumptions on the subject.* Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications, and therefore there was no proof tending to show the wrong complained of. But here again, not the influence upon the mind of the particular judge is the criterion, *but*

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[15] 247 U. S. at 421. Mr. Justice Holmes, who dissented in this case, did not question this as the common law; he concerned himself with the proper construction of the 1831 statute and its successors and did not bring forth his clear and present danger doctrine until he spoke for the court in *Schenck v. U. S.*, 249 U. S. 47, which was decided at the following term and was not a contempt proceeding.

the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice, and to the evil to come from its obstruction, *the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case* The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."[16]

This language was reiterated and applied in *Sinclair v. United States*, 279 U. S. at 763-4,[17] and by the California Supreme Court in *Matter of Bridges*, No. 19 [R. 157].

And this has been the law of the State of California at all times. There has been no contrary pronouncement. For an early case which voiced this view, see *Matter of Tyler*, 64 Cal. 434, 438.

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[16]Criticisms have been aimed at this opinion in Frankfurter and Landis' "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts", 37 Harv. L. R. 1010, and Nelles and King's "Contempt by Publication", 28 Col. L. R. 401, both of which are cited by petitioners. But these commentaries are concerned with the procedural aspects of the decision. Neither treatise challenges the soundness of the reasonable tendency rule except as the authors conceive it to have been impaired for Federal Court purposes by the Statute of 1831. In fact, Mr. Hanson quotes the authors as recognizing that "the courts must be 'invested with incidental powers of self-protection'." (Hanson's Br. p. 23.)

[17]And see: *United States v. Sanders*, 290 Fed. 428, 432 (D.C. W.D. Tenn.); *United States v. Sullens*, 36 Fed. (2d) 230, 237-8 (D.C. Miss.); *In re Independent Publishing Co.*, 240 Fed. 849 (9th C.C.A.); *Francis v. People*, 11 Fed. (2d) 860, 865 (3rd C.C.A.); *Froelich v. United States*, 33 Fed. (2d) 660, 663 (8th C.C.A.); 6 *R. C. L.*, Sec. 21, p. 509; 13 *C. J.*, Sec. 44, p. 34; 17 *C. J. S.*, Sec. 30, p. 41.

The Supreme Court in the *Bridges* case said, with respect to the "clear and present danger" and similarly phrased tests:

> "It is sufficient to say in answer to petitioner's contention that none of these tests has been applied by the courts of this state, and that neither the Patterson nor the Sinclair case, which are in accord with the decisions of the courts of this state, has been overruled by the court in which they were rendered. We are, therefore, content to rest our decision upon the 'reasonable tendency' test in determining whether the publication or act done constituted a contempt of court." [No. 19, R. 158.]

Discussing the claim that the courts have no inherent power to deal with constructive contempt, the court said in the same case:

> "On the other hand, he (petitioner) concedes that the rule of law enunciated in our former decisions, and reaffirmed so positively and definitely in the San Francisco Chronicle case, and other recent cases, is now and for years past has been the law in the state respecting publication of articles contemptuous in their character, even though not made in the presence of the court." [R. 148.]

And:

> "From the foregoing it will appear that the overwhelming weight of authority in this country supports the decision of this state rendered in the San Francisco Chronicle case, and those cited in that opinion." [R. 151.]

These doctrines were incorporated at bar [R. 122].

Petitioners should be able to advance some overwhelming reason as a basis for urging this court to reverse itself and then impose its new concept upon the State of California as the only permissible avenue for protecting the independence of its local courts. Indeed, they should be able to furnish an affirmative answer to the query whether their "present danger" doctrine,

> "Is * * * a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" (*Twining v. New Jersey*, 211 U. S. at 106).

But no such controlling reason is disclosed. It is conceded inferentially that this new standard of clear and present danger has never found its way into the law of contempt.

Counsel for petitioners, wanting more persuasive reason, merely urge that the clear and present danger doctrine *should be* now incorporated into the contempt law[18] because, so they assert, reasonable tendency (which has been found a workable standard in England and the United States for the past two hundred years) is too vague to comply with the requirements of due process, whereas "clear and present danger" possesses all of the necessary elements of certainty.

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[18]Counsel are in error when they say (Br. p. 10): "This doctrine ('clear and present danger') was first adopted by a majority of this court in Herndon v. Lowry, 301 U. S. 242, 256." Mr. Justice Holmes spoke for the court in *Schenck v. United States*, 249 U. S. 52, and there announced and applied the doctrine in the year 1918. But that learned jurist and Mr. Justice Brandeis in 1929 joined in the reiteration and application of the reasonable tendency test to the Sinclair contempt.

"A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted." (*Railroad Com. v. Rowan & Nichols Oil Co.*, 84 L. Ed. (Adv. Op.) at 985.)

"Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations" (*Twining v. New Jersey*, 211 U. S. at 106-7.)

The Danger Doctrine Is Not Essentially Different From the Reasonable Tendency Rule.

We showed in our former brief that the doctrines are essentially one (pp. 42-47); that the protagonists of the proffered standard cannot define it in terms of contempt so as to exclude the tendency concept (pp. 43-44); and that each test presents in its application a question of fact depending for solution upon determining a matter of degree (pp. 44-47)—degree of tendency to interfere or of danger of interference.

Petitioners' latest brief says, of the application of clear and present danger to contempt, that "All that need appear is that an immediate and serious interference with a court proceeding * * * was to be expected" (p. 16). It has been repeatedly held that a publication tending to influence a pending proceeding is an interference with it. In that sense, petitioners would substitute danger of interference for the accomplished fact. But we apprehend that

counsel do not mean that. What they really mean is that the tendency to interfere should be so "immediate and serious" that success in influencing the proceeding "was to be expected". In other words, as they now define it, their rule merely calls for a clearer case of tendency,—for a difference in degree.

But when it is remembered that a conviction can be had only upon evidence convincing the trial judge beyond reasonable doubt [No. 19, R. 47; *Hotaling v. Superior Court*, 191 Cal. 501, 505] of the obstructive quality of the publication, this difference in degree or danger hardly suffices to upset the common law of centuries past or to impel a declaration by this court that its application to petitioners is a denial of due process.

An analysis of the decisions discloses that the authors of the danger rule conceived no difference between it and reasonable tendency; that there was immanent in their exposition of the doctrine a recognition of the fact that a reasonable or inherent tendency to accomplish a harmful result presents a present danger thereof.

When the doctrine was first announced by Mr. Justice Holmes in the *Schenck* case,[18a] the court held that the standard had been met by a document which would reasonably be expected to influence persons subject to the draft. "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be *expected to have* upon persons subject to the draft *except to influence them* to obstruct the carrying of it out" [p. 51]. This was in response to this contention: "But it is said, suppose that that was the

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[18a]249 U. S. 52.

tendency of this circular, it is protected by the 1st Amendment to the Constitution" [p. 51]. Explaining that "It is a question of proximity and degree," the learned jurist found that the tendency of the document was enough to meet the danger test and in that connection specifically rejected the actual obstruction criterion [p. 52].

In *Frohwerk v. United States*, 249 U. S. 204, an espionage case dealing with newspaper publishers, Mr. Justice Holmes again applied the danger doctrine, saying at page 209:

> "But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame, and that the fact was known and relied upon by those who sent the paper out;"

and held the tendency in the particular circumstances to be enough.

Debs v. United States, 249 U. S. 211, held that the present danger standard had been met, Mr. Justice Holmes saying in part at page 216:

> "Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words *tending to obstruct* the recruiting service, he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their *natural tendency and reasonably probable effect* to obstruct the recruiting service, etc., and unless the defendant had the specific intent to do so in his mind."

In *Schaefer v. United States*, 251 U. S. 466, another newspaper espionage publication case, the court, speaking through Mr. Justice McKenna, referred to the *Schenck* case as affording the proper criterion of guilt and, concerning its application to the publications in question, said at page 479:

> "Their effect on the persons affected could not be shown, nor was it necessary. The *tendency of the articles* and their efficacy were enough for offense, —their 'intent' and 'attempt,' for those are the words of the law, and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny."

In *Pierce v. United States*, 252 U. S. 239, plaintiff in error contended that "there was a failure to show a clear and present danger that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act" (p. 243). Concerning the pleadings the court, through Mr. Justice Pitney, said:

> "Whether the statements contained in the pamphlet had a *natural tendency* to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer, but by the jury at the trial. There was no error in overruling the demurrer." (p. 244.)

And:

> "If its probable effect was at all disputable, at least the jury fairly might believe that, under the circumstances existing, it would have *a tendency to cause* insubordination, disloyalty, and refusal of duty in the

military and naval forces of the United States; that it amounted to an obstruction of the recruiting and enlistment service; and that it was intended to interfere with the success of our military and naval forces in the war in which the United States was then engaged." (p. 249.)

Gitlow v. New York, 268 U. S. 652, says at page 667:

> "That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, *tending* to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."

And at page 671, citing the *Schenck* case as authority for the rule, said:

> "In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if *its natural tendency and probable effect* were to bring about the substantive evil which the legislative body might prevent."

Incidentally this case, like the *Schenck*, rejected the "actual obstruction" contention. "There was no evidence of any effect resulting from the publication and circulation of the Manifesto" (p. 656).

> "And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or

> unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration." (p. 669.)

Dissenting in *Whitney v. California*, 274 U. S. 357, Mr. Justice Brandeis said at page 376:

> "To justify suppression of free speech there must be *reasonable ground to fear* that serious evil will result if free speech is practiced. There must be *reasonable ground to believe* that the danger apprehended is imminent."

None of the later cases throws any doubt upon the substantial identity of the reasonable tendency and the present danger tests.

Petitioners' Latest Differentiation Between Danger and Tendency.

And so petitioners suggest a superior virtue in the danger doctrine growing out of its "objective" nature (Br. p. 22), as opposed to the "subjective" character of the tendency test. Counsel apparently mean that the judge, in the one case, reaches his conclusion upon a consideration of proved facts and, in the other, draws it out of his own consciousness. The view finds no support in the authorities. The *Toledo* and *Sinclair* cases say:

> "But the situation is controlled by the reasonable tendencies of the acts done, and not by extreme and substantially impossible assumptions on the subject." (247 U. S. at 421, and 279 U. S. at 764.)

Quite obviously the rule does not permit of any "presumed tendency", such as petitioners suggest.

Opposing counsel are somewhat inconsistent in this matter, for, in discussing the sufficiency of the evidence to support the conviction under the reasonable tendency rule (Point 2, p. 23, *et seq.*), they invoke such considerations as these: a "construction of the language of the editorials" (p. 23); a fair interpretation "in the light of existing local conditions and the well-known views of the Times upon labor disputes" (p. 27); the Chandler affidavit setting forth "at length the policy of the Times toward labor violence and the sit-down strike" (p. 24),[19] its past expressions on the subject "on numerous occasions during the past fifty years" (p. 24); the asserted "established practice to invite opinion in probation matters" (p. 29); the casual statement of an unnamed presiding judge advising "the Times that its objection should have been made known while the application for probation was pending" (p. 29); the conduct of the District Attorney in writing "a judge respecting the penalty to be imposed on an applicant for probation" (p. 29); the more practical method of influencing the court "by a clandestine approach to the judge through a probation officer than by a frank editorial in public print" (p. 30); the purpose of the editorials in general "to advance the opinion of the editor to his reading public, and to impress upon the public the importance of the matter under discussion" (p. 30), *i. e.*, the pending legal question; the want of merit of the application for probation in point of law (p. 31); the fact that the editorial was but "the expression of the opinion of the

[19]It was not stipulated that the Chandler affidavit is true; it was merely stipulated that it be received as evidence [R. 80]; the Supreme Court was mistaken in saying [R. 134] that same was stipulated to be true.

Times upon an industrial and social matter of consequence" (p. 32); the claim that "Probation for Gorillas" "did not constitute vilification" (p. 32); that "The Fall of an Ex-Queen" was couched in "mild and temperate language" (p. 6); that the editorials approved (p. 4) and "did not assail or comment unfavorably upon the courts or any judge thereof"[20] (p. 6); the Times' "inflexible opposition to the closed shop and the sit-down strike" as a well known fact (p. 4); the absence of any specific evidence "that any of the editorials came to the attention of any of the judges before whom the related matters were pending", or that "any trial judge felt that he was influenced or embarrassed because of any of them", or that "any of the defendants in the related cases suggested or complained that any prejudice resulted to them because of the editorials"; and the absence of "any showing of an intent on the part of petitioners to influence or embarrass the proceedings in the related cases" (p. 7); the fact that each editorial followed the verdict (pp. 4-5).

Turning to the considerations which, according to petitioners, should enter into an "objective" conclusion, we find them to be these: "the circumstances under which the utterance is made, its tenor, the temper of the times, the past conduct of the speaker relative to matters of similar

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[20]Nelles and King in 28 Col. L. R. (cited by petitioners), have this to say in footnote 92 on page 547: "Friendly backing is obviously more likely than hostile aspersion to influence a judge. It is easier to close a mind than to open one. To fortify a judge in his prepossessions tends to close his mind and so impede his proper discharge of judicial function. This possibility seems never to have occurred to judicial consciousness. One court has actually observed, as if it tended to show the obstructive character of a publication, that it clearly was not written 'for a purpose laudatory to the court, or to bring it into higher repute than it was'."

import, and whether the utterance ever came to the attention of the court" (p. 22). It so happens that all these things were taken into consideration in arriving at a conviction at bar. The circumstances of the utterances were set forth in the charging papers and elaborated by the Chandler affidavit which was received in evidence [found at R. 42-52; summarized at pp. 13-14, 16-17, of our former brief]. The tenor of each editorial has been at all times one of the major subjects of debate. The temper of the times is certainly disclosed by the Chandler affidavit. The absence of any showing that the utterance ever came to the attention of the specific judge was taken into consideration by Judge Wilson and the Supreme Court [R. 104, 118, 127], and properly so according to the rule of the *Toledo* case (247 U. S. at 421).

So far as concerns "the past conduct of the speaker relative to matters of similar import" or "the temper of The Times", the Supreme Court adopted and took into consideration the Times' own picture of itself as "such an influential paper" [R. 128], and it might well have taken judicial notice, as it was invited to do, of the case of *Otis v. Superior Court,* 148 Cal. 129, wherein the executive officers of the Times-Mirror Company were relieved of a contempt conviction upon the ground that they had not been charged in proper language, notwithstanding the court's observation that "No very serious attempt is made by counsel to combat the careful and able opinion of the respondent in support of his conclusion that the articles in question did constitute a contempt * * *" (p. 130). Also the Supreme Court might well have taken judicial notice of the caustic nature of displeasure of the Los Angeles Times, a matter of common knowledge; its

lack of restraint in dealing with those of whom it disapproves is evidenced by the records of that court, as witness:

Tingley v. Times-Mirror Co., 151 Cal. 1;
Scott v. Times-Mirror Co., 181 Cal. 345;
Newby v. Times-Mirror Co., 46 Cal. App. 110;
Earl v. Times-Mirror Co., 185 Cal. 165.

The Supreme Court's discussion of the various editorials shows that all of petitioners' constituents of an "objective conclusion" were considered by it. And the actual result was a finding that there had been such successful obstruction of the pending causes that "the detriment caused by the publication of said editorials was *the probable denial of a fair trial* to the litigants in the actions then pending before the courts which were the subject of said editorials"[21] [R. 138]. And it is not to be forgotten that there was a virtual confession of guilt upon the count relating to "Probation for Gorillas" (see our former brief, pp. 5-7).

But if there be any discernible and substantial difference between the two doctrines—tendency to influence and danger of influence—it becomes apparent that the latter rule is not susceptible of application to contempt; that its field for operation is political and economic discussion.

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[21]That court has just held (Sept. 21, 1940) that the evidence failed to show commission of the crime of which the Werners were convicted. See 100 Cal. Dec. 281.

II.

As Now Defined by This Court the Present Danger Doctrine Is Inherently Inapplicable to Contempt.

Petitioners' counsel concede that "interference with one judge or one judicial proceeding" (p. 16) is a "substantive evil which the state constitutionally may seek to prevent"[22] and hence "within the allowable area of state control."[23] Indeed, they go further and state that under their conception of the present danger doctrine "All that need appear is that an immediate and serious interference with a court proceeding * * * was to be expected." As we have shown, however, this is really the tendency doctrine, not the clear and present danger rule which was enunciated by Justices Holmes and Brandeis.

The *rationale* of the *Thornhill* decision[24] forbids application of this standard to contempt of court (even if the proper criterion were not wholly within the exclusive area of state control). The opinion carefully limits the scope of free speech and freedom of the press to the fields of political and economic discussion and shows that historically and *ex necessitate* free discussion up to the danger point cannot apply to pending litigation,—this for the basic reason previously stated by Mr. Justice Holmes:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evi-

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[22]Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 373.

[23]*Carlson v. State of California*, 310 U. S. at 113.

[24]310 U. S. 88.

dence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with respect to a court."[25]

Mr. Justice Murphy said at page 95 of the *Thornhill* decision:

"Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."

Clearly the correction of error in court proceedings is the province of the appellate tribunals,—not the newspaper, the labor leader, the radio orator or the mob,—not any of the other "processes of popular government".

The real object of this freedom, as stated by the Continental Congress, is set forth at page 102 as follows:

"The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of

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[25]*Patterson v. Colorado*, 205 U. S. at 462.

> thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."

Can it be that this was intended to refer to the courts? That their deliberations are to be "shamed or intimidated, into more honourable and just modes of conducting affairs"? Petitioners have not had the temerity to embrace that doctrine. Judge Wilson thus stated the obvious truths:

> "The judicial department of the government is not on a parity with its coordinate branches. The legislator and the executive may receive petitions and advice from their constituents, they may express their opinions upon any subject at any time, yet they are not disqualified from acting. This freedom is forbidden ground to the judge. To learn any facts concerning a case, to discuss its merits, to hear any argument except in open court, or to express an opinion before hearing the evidence, is to disqualify him. Neither may he go upon the public rostrum, give interviews to the newspapers, or circularize the public, in explanation or in defense of his judicial acts. The reason for his decisions must appear from the decisions themselves." [R. 104.]

The *Thornhill* opinion further says at page 102:

> "Freedom of discussion, if it would fulfill its historic function in this nation must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Is this not satisfied, as to pending litigation, by discussion after the ruling is made, by the right of recall, or refusal to reelect? It should be remembered that discussion is not necessarily deferred until the entire cause is ended: that it is improper only as to pending matters (see ruling as to count one of the *Shuler* case, 210 Cal. at 387, and authorities cited at p. 41, *infra*); and that the courts found in each instance at bar that the wrong consisted in influencing not the verdict but the ensuing matter which the trial judge was about to determine judicially.

Mr. Justice Murphy said in the *Thornhill* opinion (p. 104):

> "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

Never in our history until Mr. Justice Edmonds and Mr. Justice Gibson suggested it has it been thought that judicial deliberation must abide (or be subject to) the test of its merits "by competition for acceptance in the market of public opinion."[26]

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[26]Neither *State v. American-News Co.*, 64 S. D. 385, nor *Nixon v. State*, 207 Ind. 426, goes so far. The *Nixon* case related to a past matter, like count one of the *Shuler* case, and the court did not reject the tendency doctrine. The *American-News Co.* case exhibits judicial palsy in the face of the power of the press. The court exonerated the defendants although it said at page 400: "The defendants by their series of publications attempted to arrogate unto themselves the administration of justice in regard to all these cases. It is unfortunate for any community when this occurs." But more unfortunate for the State of South Dakota when its Supreme Court exhibited so little courage as to exonerate the defendants from the clearly established charge of contempt with the confession that "very possibly we do" err.

Referring to such cases as *Thornhill, Herndon, Hague* and *Schneider* (and naming part of them), Mr. Justice Frankfurter said in the *Minersville School District* case (footnote 6 on p. 998): "the Court was concerned with restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function",—thus clearly differentiating them from contempt proceedings. For the processes of popular rule were never intended to "effectively function" through direct application to judicial deliberations of a judge concerned with a pending matter. They—the processes of popular rule—are given full scope through the indubitable right to criticize any closed matter; to join as friends of the court (*e. g.*, American Civil Liberties Union and American Newspaper Publishers Association at bar) in seeking a reversal; to recall the judge; to refuse to reelect him; to bring about his impeachment or his removal from office by legislative action (see Cal. Const., Art VI, Sec. 10).

III.

Reasonable Tendency to Interfere With a Pending Court Proceeding Is a Long Established Common Law Standard Which Does Not Lack Requisite Certainty.

We have, in discussing *Herndon v. Lowry*[27] in our former brief (pp. 48-52), pointed out the basic difference between a new and vague statutory measure of guilt, one not confined to "a described and defined activity of the Government", on the one hand, and a well settled common law standard "notwithstanding an element of degree in the definition as to which estimates might differ", on the other.[27a] We also have shown the antiquity and uniformity of the reasonable tendency test. Its successful administration for some two hundred years or more renders presently applicable the remark of Mr. Justice Holmes, who said in *International Harvester Co. v. Kentucky*, 234 U. S. 216, at 223:

> "The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe."

But opposing counsel have not met this point directly nor attempted to differentiate the authorities upon which it rests. Obliquely they assert the *Cantwell* decision to be at variance with those cases and to have impliedly overruled them, although none of them is there mentioned.

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[27] 301 U. S. 242.

[27a] As to this well settled distinction, see also 16 *C. J.*, Sec. 28, pp. 67-68; 22 *C. J. S.*, Sec. 24a, pp. 70-73.

***Cantwell v. Connecticut* Is Not Opposed to Respondent's Position.**

The *Cantwell* decision is not, as contended by petitioners, at variance with these cases.[28] The fifth count, under which petitioner Jesse Cantwell was convicted, charged, as shown by the report in 8 Atl. (2d) 535 (126 Conn. 1), that petitioner "did disturb the public tranquility by certain acts or conduct inciting to violence or tending to provoke or excite others * * * to break the peace"; and the state court held that "The fifth count charges a breach of the peace by acts which are within the common-law definition of that offense" (p. 536); but this tribunal held the contrary, saying at page 309:

> "One may, however, be guilty of the offense if he commit acts or make statements *likely to provoke* violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. * * *
>
> "We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion."

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[28] *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 92; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 459; *Fox v. Washington*, 236 U. S. 273.

And hence the court further concluded that petitioner had been convicted "on a common law concept of the most general and undefined nature" (p. 308), a mistaken concept. The opinion impliedly concedes that the common law offense of breach of the peace, correctly understood and applied, would be a sufficiently definite standard of guilt.

Authorities Such as Herndon v. Lowry Do Not Support Petitioner's Contention.

We have discussed that case[28a] at pages 48-52 of our former brief, but counsel supporting petitioners lay so much stress upon it that it seems necessary to more clearly indicate its proper place in the jurisprudence of free speech.

None of the cases so far decided rejects "reasonable tendency" to accomplish a harmful result where that test has been prescribed by the legislature. Cases which seem to reject it in the field of political and economic affairs do so only as counsel attempt to engraft that criterion upon otherwise vague standards not permitting of that construction. As we pointed out in our former brief, that is manifestly true of the *Herndon* decision. That opinion *ex industria* makes it clear that the court was not dealing with a canon of conduct expressed with reasonable certainty and reflecting a legislative determination that such conduct is harmful because of its dangerous tendency. At page 260 it is said:

> "It is to be borne in mind that the Legislature of Georgia has not made membership in the Communist

[28a] 301 U. S. 242.

> Party unlawful by reason of its supposed dangerous tendency even in the remote future. The question is not whether Georgia might, in analogy to what other states have done, so declare."

This was by way of emphasis of what had previously been said concerning the *Gitlow* case:

> "It relies particularly upon Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625. There, however, we dealt with a statute which, quite unlike §56 of the Georgia Criminal Code, denounced as criminal certain acts carefully and adequately described." (p. 256.)

And, quoting that case:

> "'* * * when the legislative body had determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.'" (p. 257.)

The trouble with the Georgia statute was that it neither reflected a common law standard nor any other rule of action sufficiently definite to serve as a standard. But the inference is irresistible that had the legislature written into the statute some common law criterion, it would have been upheld.

The contempt rule of reasonable tendency which came to us as a part of our basic jurisprudence stands on a parity with the legislative declaration of a standard of misconduct. In effect the rule declares that the proscribed utterances, because of their tendency "to obstruct a described and defined activity of the government" (*Herndon*, p. 256)—the functioning of the courts—present a present danger of a "substantive evil which the state constitutionally may seek to prevent," one "within the allowable area of state control." Like the *Herndon* case, the *Minersville School District* decision draws attention to the higher authority of rules of conduct which constitute "manifestations of specific powers of government deemed by the Legislature essential to secure and maintain * * * orderly, tranquil, and free society."[28b] The *Erie Railroad* case (304 U. S. 64) establishes that it makes no difference whether the state has spoken through its legislature or its common law if it has spoken with sufficient certainty.

A survey of the rulings of this court will show that the danger doctrine has not operated in any single instance to strike down a reasonable tendency standard prescribed by the legislature. In none of the cases where it was declared or applied was any statutory (or any common law) standard of reasonable tendency involved.

[28b]84 L. Ed. (Adv. Op.) at 996.

Comparative Certainty of the Tendency and Danger Tests.

Final proof of the fatal uncertainty in the reasonable tendency test is to be found, petitioners say, in the divergent views held by the Bar Association Committee, the trial judge and the Supreme Court concerning the Times editorials. The present danger test affords no ground for any such difference of opinion, so the argument proceeds. It can best be appraised by scrutinizing the history of the application of this test to specific factual situations. And the record shows that in most instances where this court has applied it the justices have been unable to agree; there have been dissents as to the sufficiency of the evidence to meet this standard. In *Abrams v. United States,* 250 U. S. 616, there were two dissents; in *Schaefer v. United States,* 251 U. S. 466, three dissents; in *Pierce v. United States,* 252 U. S. 239, two dissents; in *Gilbert v. Minn.,* 254 U. S. 325, one dissent; in *Gitlow v. New York,* 268 U. S. 652, two dissents; in *Herndon v. Lowry,* 301 U. S. 242, four dissents; in *Thornhill v. Alabama,* 310 U. S. 88, *Carlson v. California,* 310 U. S. 106, and *Schneider v. State,* 308 U. S. 147, there was a dissent; and in *Hague v. Committee for Industrial Organization,* 307 U. S. 496, the justices of this court delivered three separate opinions in support of the ruling, being unable to fully agree upon the grounds therefor, while two of the justices dissented. If the present danger rule is so clear and precise as petitioners contend, it would seem that the members of this august tribunal would be able to agree more readily upon its proper application to varying sets of facts.

"The Brooding Omnipresence of Fear."

The argument that, because of vagueness in the definition, "so uncertain will be the average citizen whether his utterance may have a 'reasonable tendency' to interfere with the orderly administration of justice, that, impelled by the apprehension of criminal prosecution, he will remain silent despite his constitutional right of freedom of discussion" (Petnrs. Br. p. 19) is interesting when advanced by this petitioner after its fifty year fight for the open shop "at great cost to itself in the lives of employees and in property damage", doing "everything in its power to establish and to maintain the open shop principle", making it "a leader of community thought and action in matters wherein the welfare of such relations is involved" [Chandler Affidavit, R. 44]; and especially after the experience of its executive officers in *Otis v. Superior Court, supra,* and the reiteration of the doctrine in the widely publicized *Shuler* Case, 210 Cal. 377. The present publications, particularly "Probation for Gorillas", are sufficient proof that the common law standard is not such as to frighten petitioners from free expression of their views or to discourage them from years of litigation in the hope of a successful termination as in the *Otis* case, —no "brooding omnipresence of fear", as suggested in the Hanson brief (p. 12).

Petitioners' Misplaced Argument as to Finality.

Petitioners further attack the reasonable tendency rule upon the ground that it defers all discussion of court proceedings until complete finality in the court of last resort (Br. pp. 20-21) and until the matter of comment has become stale and no longer newsworthy,—"until every conceivable legal procedure in connection therewith has been exhausted" (quoting Hanson Brief, p. 22). The argument overlooks the authoritative ruling of this court that the duration of the pendency of an action for contempt purposes is exclusively a question of state law (*Patterson v. Colorado*, 205 U. S. at 460) and the rule is no longer open to discussion as claimed by *amicus curiae* Hanson at page 21. But petitioners' criticism would possess no substance if the matter were to be now reexamined on its merits.

To begin with, the rule has no relation to substantially true news accounts published at any stage of the proceeding,[29] news accounts as distinguished from discussion of the merits. In the second place, the desire to publish comment does not prove or create the right to do so. The publisher must await finality of the particular matter because he must refrain from injecting extraneous influences into the judicial deliberations. Neither he nor his reader is entitled to debate with the judge the merits of a matter *sub judice*.

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[29] *In re Shortridge*, 99 Cal. 526.

Counsel's illustrations on brief page 21 are interesting because so far fetched. They say that finality of a murder conviction occurs only with defendant's execution because forsooth a writ *coram nobis* may lie. Such extreme arguments defeat their own purpose.

Finality is requisite, but it is finality of the matter under discussion.[30] So held as to the first count of the *Shuler* case in 210 Cal. at 387.[31] But it was likewise there held that the finality of that first phase of the cause did not warrant the discussions mentioned in the second and third counts and which related to approaching judicial action on other phases of the case. So at bar, petitioners were not convicted because of the relation of their publications to the verdicts mentioned; it was because of the potential influence upon phases of the case which were still pending and which would require early action by the judge [see R. 124-5, 128, 130, 132-3].

Reasonable tendency is a realistic test. It applies to publications which are so timed and circumstanced as to possess sufficient momentum to invade the judicial chambers.

The Los Angeles Times, through its localized circulation, lacks potentiality to interfere with the deliberations of the Supreme Court of the United States. And while

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[30]See: 6 *R. C. L.*, Sec. 25, p. 512; 17 *C. J. S.*, Sec. 30b, p. 44; 12 *Am. Jur.*, Sec. 31, p. 413; *In re Independent Publishing Co.*, 240 Fed. 849, 853-4 (9th C.C.A.).

[31]*Cf. Van Dyke v. Super. Ct.*, 24 Ariz. 508, 541.

an issue of the San Francisco Chronicle possesses sufficient momentum to reach the Supreme Court in San Francisco (1 Cal. (2d) 630), the same article, appearing in an inconspicuous country newspaper, would not have had the requisite reasonable tendency to disrupt the judicial calm.

The short of it is that "reasonable tendency" must be determined with reference to the particular facts. What would interfere with the deliberations of the Superior Court of Los Angeles County might not be calculated to come to the attention of this court, or *vice versa*. What would be a contempt of one court might not be an offense against the other. Though relating to a different stage of the same cause, the question of reasonable tendency must be solved with reference to the nature and place of the utterance and its inherent momentum.

So the *coram nobis* argument is misplaced and reflects only a distorted viewpoint of petitioners. It takes us into the realm of "extreme and substantially impossible assumptions on the subject" which have been carefully excluded in defining the limits of the reasonable tendency standard.

Petitioners Seek Special Immunity, Not Equal Protection of the Laws.

Counsel for petitioners tacitly concede the decision in *Sinclair v. United States*, 279 U. S. 749, to be sound in relation to its facts. In that case the reasonable tendency doctrine was reannounced and applied. Petitioners seek to differentiate it upon the factual basis that "it was not

a free speech case". Reasonable tendency thus becomes a sufficiently definite standard for determination of contempts other than publications or speech. So far as vagueness is concerned, the standard is as definite in one instance as the other.

Petitioners do not seek equal protection of the laws. They invoke different standards for different classes of people. In arguing for this differentiation between classes of contempt cases, counsel have repeated the error of the Associated Press in its effort to avoid the application of the National Labor Relations Act, for especial immunity is sought on behalf of the publisher. Concerning this attitude, Mr. Justice Roberts said in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 133:

> "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court."

The "Actual Obstruction" Principle.

Mr. Wirin in his *amicus curiae* brief herein advocates adoption of the test of actual obstruction. And the matter is therefore discussed at pages 53-56 of our former brief. But counsel for petitioners in this cause have not embraced that contention; they have waived it, and we therefore discuss the matter no further in this brief. If it becomes of interest here, our views will be found in the brief filed contemporaneously herewith in the *Bridges* case.

IV.

This Proceeding Presents No Federal Question.

The matter is discussed at pages 31-38 of our former brief.

It is there shown that the definition of lawful or unlawful conduct, the establishment and maintenance of independent courts, are within the exclusive keeping of the states,[32] pertaining to their internal sovereignty,—subject only to the requirements of due process and equal protection of the laws.

Twining v. New Jersey, 211 U. S. 78, 106:

> "In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that, in our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power. The power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in Hurtado v. California, 110 U. S. 516, 527, 28 L. ed. 232, 235, 4 Sup. Ct. Rep. 111, 292."

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[32]See, also, *Ex parte Converse*, 137 U. S. 624, 631-2.

That due process in the procedural sense was afforded petitioners is amply disclosed by the facts reviewed at pages 1-6 of our former brief and the authorities cited at pages 34-38.

That there was uniform application of the law appears from comparison of the *Times* case with the *Bridges* proceeding, as well as the *Chronicle*, *Shuler*, *Shortridge* and other cases cited by the Supreme Court [see R. 122 and No. 19, R. 147, 156].

The Common Law of Two Hundred Years Duration Cannot Be a Denial of Due Process.

But counsel would create a constitutional question out of asserted error in the rule which has prevailed for two hundred years, forgetting that "no constitutional rights can be based on the error of prior decisions";[33] also forgetting that the fourteenth "amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had."[34] Indeed, the very antiquity of the reasonable tendency rule establishes its harmony with due process.

What Mr. Justice Frankfurter said about legislation and religious liberty is equally applicable here:

> "Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic war-

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[33] *Dunbar v. New York*, 251 U. S. 516, 519.

[34] *Minor v. Happersett*, 88 U. S. 162, 171.

> rant.[35] * * * Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom." (Minersville School Dist. v. Gobitis, 84 L. Ed. (Adv. Op.) at 995-6.)

Mr. Justice Holmes, deciding a party wall controversy under the laws of Pennsylvania,[36] referred to the fact "that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn, and has prevailed in the state ever since" (p. 30), and held:

> "The 14th Amendment, itself a historical product, did not destroy history for the states, and substitute mechanical compartments of law, all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the 14th Amendment to affect it, as is well illustrated by Ownbey v. Morgan, 256 U. S. 94, 104, 112, 65 L. ed. 837, 843, 846, 17 A. L. R. 873, 41 Sup. Ct. Rep. 433" (p. 31).

The cited case of *Ownbey v. Morgan* dealt with the Delaware attachment statutes. Concerning the matter now in hand, the opinion said:[37]

> "A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, * * *.

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[35]It is immaterial, of course, whether the state has spoken through its Legislature or its courts defining the common law. See quotations from *Erie R. Co. v. Tompkins*, 304 U. S. 64, at pages 32-33 of respondent's initial brief herein.

[36]*Jackman v. Rosenbaum Co.*, 260 U. S. 22.

[37]256 U. S. at 111-12.

"However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the 14th Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the states to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammeled liberty to make amendments. Neither does it, as we think, require a state to relieve the hardship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment."

Nor does the 14th Amendment contain any mandate for the rejection of a time-honored criterion of contempt and substitution of a new and putatively better one.

Large Implications of Recognition of Federal Question Here.

The result of a holding that the case presents a Federal question would be fraught with large consequences. We assert that the determination of the rules necessary to preserve the independence of the California state courts is solely within state competency; that no supervisory power rests in any branch of the Federal Government; and that substitution of a new rule for the state courts would constitute a serious impairment of the autonomy of the state; "whenever a new limitation or restriction is declared, it is a matter of grave import, since, to that extent, it diminishes the authority of the state, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union" (*Twining v. New Jersey*, 211 U. S. at 92).

The California Supreme Court has declared that "Every court is the exclusive judge of its own contempts" (*Otis v. Superior Court*, 148 Cal. at 130) and this court that "this is no technical rule," for "To submit the question of disobedience to another tribunal, be it jury or another court, would operate to deprive the proceeding of half its efficiency" (*Re Debs*, 158 U. S. at 595).

If the rule of the *Patterson, Toledo, Sinclair* and similar cases is now to be abandoned, if the cogency of the evidence supporting state convictions is to be here reviewed—three thousand miles from the place of the contempt—then indeed are the state courts rendered impotent. Few courts have the aid of Bar Associations willing or financially able to sustain the burden of supporting for two or three years, and to the highest court in the land, their judgments. If contempt is held a Federal question and the evidence reviewable, any litigious contemner will be able to frustrate the local courts; their hands will be stayed by the ever present threat of Federal review and lack of ability to pursue the matter. The truth of this assertion would be even more apparent if this court were to find itself unable or unwilling to take judicial cognizance of the local situation reviewed at pages 53-60, *infra*.

Writ Should Be Dismissed.

We respectfully submit that the instant writ should be dismissed as one improvidently granted in the absence of a substantial Federal question.[38]

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[38] *Snowden v. Red River, etc. Dist.*, 284 U. S. 592; *Servier Commissior Co. v. Wallowa Natl. Bank*, 287 U. S. 575.

V.

The Sufficiency of the Evidence to Sustain the Conviction Is Not Open to Review Here.

This is true, subject only to the single exception that the court, in event of rejecting the reasonable tendency criterion and substituting present danger, would be called upon, as suggested at page 5 of the petition, to determine whether the evidence meets the latter standard; if petitioners are guilty according to the standard they have invoked, their conviction cannot possibly have resulted in a denial of due process or equal protection of the laws.

But if this court holds the reasonable tendency test to be consonant with constitutional requirements, that ends the case; the sufficiency of the evidence then becomes strictly a state question,—a preliminary or conditional fact which is not bound up in the Federal question of what criterion the Constitution demands. The Federal question arises, if at all, upon the legal controversy as to the requisite standard of contempt, not upon the distinctly separate question of fact as to whether that standard has been met.

The rule that this court will review the evidence to determine for itself the existence of a Federal question is limited to cases of necessity.

Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, was an action upon a policy of life insurance, which resulted in favor of plaintiff. Upon writ of error the Insurance Company claimed that the undisputed evidence established that the policy had never become a completed or binding contract; it also raised the question of whether the same was governed by the laws of Tennessee, Connecticut or Texas. This question of conflict of laws was held to be

Federal. Concerning the matter of insufficiency of the evidence, the court said at page 394:

> "The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here. * * * To this general rule there are two equally well-settled exceptions: '(1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' * * * This case comes within the general rule, and not within either of the exceptions. The fact decided is that the policy sued upon was delivered as a completed and binding contract. The Federal question presented arises from the ruling of the court that the Texas, and not the Tennessee, statute, controls this contract. The asserted Federal right was not denied as a result of the finding of fact; nor are the conclusions in respect of the Federal right and the finding interdependent, or so intermingled as to cause it to be necessary to consider the latter in order to pass upon the former. That the contract was effective is a fact equally consistent with the determination of the Federal question either way."

And the fact that the instant publications had a certain tendency is an independent fact which is equally consistent with determination of the Federal question either way. If the tendency test is upheld the factual finding supports the judgment; if tendency is rejected the finding of fact falls with it, swept aside as an inconsequential in-

cident of a void judgment. (The *finding* of reasonable tendency is swept away, but the evidence remains as a basis for further inquiry into the dangerous quality of the editorials.)

Grayson v. Harris, 267 U. S. 352, was an action to determine title to certain lands in which plaintiffs' rights depended upon proof that they were citizens of the Creek Nation. It was claimed that this court should "review the record in that respect in order to determine whether there was any basis for the claim of Federal right" (p. 357); but the court said:

> "The point that the evidence fails to show, that plaintiffs in error were Creek citizens, presents a pure question of fact. The trial court found they were. The state Supreme Court expressly affirmed the finding, and, recognizing the existence of the Federal question in the case, put its decision denying the Federal right upon an erroneous view of the law. The denial was not the result of the finding of fact, nor is that finding so intermingled with the conclusion of law in respect of the Federal right as to cause it to be necessary to consider the matter of fact in order to pass upon the Federal question. * * * The effect of the finding was to establish the existence of a preliminary fact, related to the Federal right only in the sense that it brought the case within the reach of the Federal law relied on, and called for a determination of the Federal question then presented. In other words, the finding simply established a condition, not as a basis upon which to rest a decision of the question of Federal right one way or the other,

but upon which that question became an issue for consideration and determination. In such case, the ordinary rule applies that the decision of the state court upon a question of fact cannot be made the subject of inquiry here." (pp. 357-358.)

This language seems fully applicable here. The *fact* of the unlawful tendency of the publications relates to the Federal right (the proper standard) only in the sense that it "brought the case within the reach of the Federal law relied on, and called for a determination of the Federal question then presented." If due process has been denied petitioners, it is because of failure to apply the proper legal standard to the evidence, not because of the determination of the proper factual inferences to be drawn from that evidence.

Nor do we have a case where the factual finding is "so intermingled with the conclusion of law in respect of the Federal right as to cause it to be necessary to consider the matter of fact in order to pass upon the Federal question." The cases of *Herndon v. Lowry*[39] and *Cantwell v. Connecticut*[40] fall within this latter category and hence are clearly distinguishable from the matter at bar.

But if it be held that we err in this regard or that a weighing of the evidence in the light of the present danger rule is necessary, we submit that it is ample to support a conviction according to either standard.

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[39]301 U. S. 242.

[40]310 U. S. 296.

Editorials in Question Were Contemptuous According to Any Suggested Standard.

Under the above caption we have discussed the background, tenor and effect of the editorials at pages 12-30 of our former brief.

Petitioners now assert that the editorials should be "fairly interpreted in the light of existing local conditions and the well-known views of the Times upon labor disputes" (Br. p. 27), and we feel impelled to place before this court certain "existing local conditions" which are not included in our former brief herein. We quote from our brief in the Supreme Court of California (p. 126, *et seq.*):

> **"The Clear and Present Danger to the Independence of the Los Angeles Superior Court.**
>
> "We are about to refer to matters which were presented to Judge Wilson, of which he could and presumably did take judicial notice, and which this court will likewise take into consideration by application of the same doctrine, for judicial notice applies to proceedings on review as well as in the trial court (Varcoe v. Lee, 180 Cal. at 343; People v. Tossetti, 107 Cal. App. 7, 12; Inyo Marble Co. v. Loundagin, 120 Cal. App. 298, 304; City of Los Angeles v. Pomeroy, 124 Cal. 597, 641)."

We interrupt the quotation to explain facts well known locally. The Superior Court of Los Angeles County has fifty elective judges with no party sponsorship, and the Municipal Court of the City of Los Angeles has thirty judges similarly situated. The newspaper pub-

lishers of Los Angeles believe that the reelection of these judges is largely dependent upon newspaper approval or disapproval, expressed ordinarily through generous publicity or withholding of any. They have consistently nurtured this thought in the minds of our elective judges, many of whom hold to the same view. There are at least 1,600,000 voters in Los Angeles County and 900,000 in the city alone; the 1938 figures are comparable.

The wide circulation of the Los Angeles Times is alleged [R. 10] and admitted [R. 29].

> "That said 'Los Angeles Times' has now and at all times herein mentioned had a circulation of over 200,000 copies per day most of which said copies of said paper are now and at all times mentioned herein were circulated and read in the City of Los Angeles, and County of Los Angeles, State of California." [R. 10.]

The fact of its circulation in and about the courthouse, of its being read by a large number of the fifty incumbent judges, is within the judicial knowledge of the Superior Court.

Toledo Newspaper Company v. United States is in point. The opinion of the Circuit Court of Appeals (later affirmed) had this to say on the subject (237 Fed. at 991):

> "It is urged that the record does not show that the publications were currently read by the judge of the court, or that the papers containing them were sold or distributed in the courthouse corridors, on the

steps, or in the immediate vicinity of the courthouse. If these facts are essential, they may and should be presumed in support of the judgment. There is no proof to the contrary, and it is highly probable that in a city like Toledo, and with a courthouse situated as it there is, an afternoon paper, with a daily circulation of 50,000, and with five editions each day, not only is read every day by the great part of the reading public, including the judges, but is cried and sold by the hundreds and thousands under the courthouse windows, and is brought into, if not sold in, the corridors and offices of the building. We refer to these presumptions and probabilities only to indicate that the lack of precise allegation or proof as to these facts cannot, in any event, be fatal, but without intending to decide whether these facts may be necessary."

These are some of the things which the California Supreme Court had in mind when it said:

"These expressions of approval of the verdict and condemnation of the convicted defendants made *by such an influential paper* as the Los Angeles Times on the day just preceding the day fixed by the court for pronouncing sentence *could not help having an effect upon the trial judge*, who, as we have seen, was clothed with a wide discretion in fixing the punishment of the convicted defendants, to say nothing respecting his duties in case a motion for a new trial was made or an application for probation was presented to him." [R. 128.]

We resume the quotation from the brief:

"The Los Angeles Bar Association's Committee for Preservation of Judicial Independence was formed at the urgent suggestion of the Presiding Judge who was in office during the year 1937, and it grew out of conditions resembling those of the Shuler era[41] when he, through threats and flattery, was engaged in an endeavor, which for a time approached appallingly close to success, to impose his will upon the judges of the Superior Court concerning any litigation in which he happened to take an interest. But the recent conditions, which were becoming progressively worse, involved a somewhat contemporaneous series of drives upon the judges by various pressure groups, such as the AFL and CIO; at the same time the practice of trying cases in the newspapers was growing in extent and obnoxiousness, and many attorneys were unfortunately lending themselves to the practice of giving to the newspapers advance statements of their views concerning the merits or the evidence about to be produced. A committee of one of the above mentioned labor organizations called upon the Presiding Judge in an effort to persuade him to replace the judge then in charge of the Order to Show Cause Department[42] with a judge whose economic and social views would be more acceptable to that labor organization. At about the same time

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[41] *In re Shuler*, 210 Cal. 377.

[42] The Department of the Superior Court which handles preliminary injunctions, special writs and the like.

one Heist, speaking on behalf of one of those organizations, delivered over the radio a diatribe directed at the judge presiding in the Order to Show Cause Department, and he mailed a copy of it to the then Presiding Judge. During litigation between McPherson and Crawford[43] someone mailed to each of the Superior Court judges a copy of one or more issues of a small newspaper which was freely discussing the merits of the case about to come to trial. During the Markham Will case the Hollywood Red Ink, a newspaper (reputed to be controlled by one of the attorneys in that litigation), took such an active and partisan interest in the case that it became wellnigh impossible for the attorney of the contestee to find a judge who would act on any matter pertaining to the case, even though it related to a rather formal phase of it. During the pendency of the litigation involving the San Pedro Hiring Hall (which is mentioned in the Bulcke case now under submission, LA 16804),[44] telegrams of Bulcke, Wahlenmaier and others were received by Judge Schmidt, the trial judge, seeking to influence his action upon matters such as motion for new trial, etc. And Harry R. Bridges, during that same proceeding, made an affidavit which, filed by Mr. Katz, one of the attorneys for defendants, resulted in his (Katz) punishment for contempt; the judgment was upheld by the rul-

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[43]Litigation between Aimee Semple McPherson and Rheba Splivalo Crawford concerning the Four Square Gospel Church.

[44]Decided in 14 Cal. (2d) 510 and 14 Cal. (2d) 799.

ings of the District Court of Appeal and this court in Matter of Katz, Second Civil No. 11806. Bridges also sent to the Secretary of Labor and caused the newspapers to publish pertinent portions of a telegram relating to that litigation, which telegram on its face sought nothing of Madame Perkins and was obviously calculated through its publication to come to the attention of Judge Schmidt and to influence his decision; the contemptuous nature of this communication has been finally adjudicated in Bridges v. Superior Court, S. F. 16174.

"All of these things occurred before the hearing of the Times case. During its progress the semi-annual report of Judge Wilson concerning the Order to Show Cause Department was rendered to the Presiding Judge and revealed the fact that 41 contempt matters had been handled in that department during the six months' period; but this covered only the one department of the court, and we have no way of knowing how many additional contempt matters there were. The above mentioned instances, some of which occurred before 1938, are but outstanding examples of a growing tendency of outsiders to attempt to bring pressure upon the court to render what they conceive to be just judgments. And among the 41 matters handled by Judge Wilson was the instance of the labor sympathizer who tied to a string a copy of the temporary injunction rendered in a labor dispute and publicly dragged it in the gutter, a thing which was duly publicized and became a matter of common knowledge.

"While these things were occurring, most of them being attempts of the labor faction to impress their views upon the court, the Los Angeles Times, absorbing the spirit of the moment, fell into line and adopted or revived a policy of publishing editorials concerning the merits of these pending matters, again largely labor disputes; and these editorials became increasingly bold until they culminated in 'Probation for Gorillas', wherein the Times directly addressed the trial judge and told him in no uncertain terms that on account of consideration of public policy (regardless of his view of the sufficiency of the evidence or the existence or gravity of errors or of extenuating circumstances) probation should be denied as an alternative to the commission of a grave mistake.[45] The attitude of labor toward the courts had fairly indicated that there would be no hesitation in bringing pressure to bear upon the judge to grant probation to Shannon and Holmes, and it is a fair inference that the Times, foreseeing this, determined

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[45]The gratuitous assertion that the Times proceeding was instituted only as a result of "a systematic survey of editorials that had appeared in the 'Times' over a period of approximately six months" (Hanson Br. p. 16) and that the Times' "editorial columns had been searched over a period of some six months in the hope that something would turn up to support a charge of contempt" (*Id.* p. 17) is without any foundation. As a matter of fact, efforts were being made by the Bar Association Committee while these editorials were appearing to arrive through conference at some satisfactory solution of the growing practice of addressing the courts upon pending cases. But The Times would have none of it. And when it finally published "Probation for Gorillas" the Presiding Judge of the Superior Court brought the matter to the attention of the Bar Association Committee who forthwith instituted the contempt proceeding, including the five editorials set forth in the Elkins affidavit.

that, if within its power, it would prevent the successful exercise of that sort of influence and substitute its own judgment as that of the court. Petitioners have virtually admitted the contemptuous nature of one of the editorials [Tr. p. 66, line 21].

"And so we have here illustrated the grave evil of extramural arguments concerning pending matters. Labor, on the one hand, attempting to coerce the court into granting probation, and the Times, on the other, threatening and scolding that probation should not be granted. If it be necessary to this proceeding to prove the existence of a clear and present danger, according to Mr. Wirin's doctrine, then we have it clearly in the County of Los Angeles, at the time of the institution of the instant proceeding."

If the discussion of the editorials, found at pages 12-30 of our former brief herein, be read in the light of these well known "existing local conditions" and the "well-known views of the Times upon labor disputes", as elaborated in the Chandler affidavit [R. 44], the immediate danger of interference with the court proceedings becomes clearly manifest.

This conflict between the alleged prerogatives of the press and the independence of the courts is neither new nor local. In an appendix hereto we have incorporated some interesting lay comments on the subject.

VI.

New Arguments Concerning "Probation for Gorillas".

This is the editorial of which the California Supreme Court said:

> "But little is said, or can be said, in defense of the publication of this editorial" [R. 131],

and that:

> "* * * petitioner, The Times-Mirror Company, advances no serious defense of its publication of said editorial in so far as the character and nature of the editorial are involved * * *." [R. 131.]

Petitioners' Claim That Probation Would Not Lie.

In addition to the matters suggested in their former brief herein, counsel for petitioners now advance the argument (Br. pp. 6, 31) that an application for probation would not lie in the case of Shannon and Holmes and inferentially that "Probation for Gorillas" related to a proceeding that was entirely *coram non judice*.

Let it be assumed *arguendo* that the court could not properly grant probation in this instance. It does not follow, however, that its entertaining the application was not a judicial function whose exercise must be free of extraneous influence. In other words, when defendants applied for leave to file an application for probation, the court was required to determine that same would not lie or that same might be filed for the purpose of further

considering the question of the applicability of the probation statute to the crime in question. So long as that point was under consideration, the court was exercising a judicial function which might or might not result in error, or even in excess of jurisdiction, but which, under settled principles, is and must be protected from extraneous influence in the same manner and to the same extent as the performance of any other judicial act.

The law is well settled by such cases as the following:

Gompers v. Buck's Stove & R. Co., 221 U. S. 419, 450;

United States v. Shipp, 203 U. S. 563, 572;

United States v. Toledo Newspaper Co., 220 Fed. 458, 494-5 (D. C.);

United States v. French, 9 Fed. Supp. 30, 31-32 (D. C. Mich.);

Russell v. United States, 86 Fed. (2d) 389, 392 (8th C. C. A.);

Howat v. Kansas, 258 U. S. 181, 189.

The plain distinction between a right to refuse to carry out a void order and an attempt to influence the court's determination of whether it has jurisdiction to make the order is well drawn in the *Russell* case, *supra*.

If jurisdiction to grant probation were essential to the existence of a contempt in this instance, it would nevertheless appear that the court had power to reduce the crime to one of simple assault (Penal Code, Sec. 1182, Subd. 6), one not involving use of a deadly weapon, in which event probation would unquestionably lie.

That Judge Scott was acting within his jurisdiction in permitting filing of application for probation by Holmes

and Shannon is not open to question. *People v. Tufano*, 7 Cal. App. (2d) 561, 562:

> "There is nothing in the provisions of Sec. 1203 of the Penal Code which precludes the filing of a probation application, even though by its terms probation may not be granted, as in the instant case. The inquiry was obviously advantageous to appellant, since the penalty imposed was commitment to the county jail, which fixed the crime as a misdemeanor in lieu of a penitentiary sentence."

Editorial Not Limited to Matter of Probation.

It must also be remembered in considering "Probation for Gorillas" that it not only advised Judge Scott to deny probation, but insisted upon his exercising his discretion by way of making the crime a felony and sentencing defendants to the jute mill at San Quentin. This phase of the matter was discussed by the Supreme Court at R. 133.

Argument Concerning Penal Code Section 166.

In this same connection, petitioners assert (Br. p. 3, footnote 1) that they "were not prosecuted for violation of California Penal Code Sec. 166, Subd. 8, which is relied on by respondent to sustain the judgment in respect to 'Probation for Gorillas'?" Apparently the thought is that this definition of contempt has no application at bar. It reads:

> "Criminal contempts. Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor:
>
> * * * * * * * *
>
> "8. Presenting to any court having power to pass sentence upon any prisoner under conviction, or to any member of such court, any affidavit or testi-

> mony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this code."

This is but a declaration that a violation of Sec. 1204, Penal Code, constitutes a contempt. That section declares the substantive law as follows:

> "* * * No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section."

Such a contempt may be prosecuted by indictment or pursuant to the Code of Civil Procedure.[46]

The fact that the substantive law is found in the Penal Code rather than the Civil Code or Code of Civil Procedure is immaterial, for the Codes are to be read together as a single statute.[47] It is clear that the statute governs at bar.

It is likewise clear under the *Shuler* decision, 210 Cal. at 401, that the publication was contemptuous regardless of the specific statutory prohibitions.

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[46]See: *In re Morris*, 194 Cal. 63; No. 19, R. 142-44; *Jurney v. MacCracken* 294 U. S. 125, 151.

[47]*Pol. Code*, Sec. 4880; *Proctor v. Justice's Court*, 209 Cal. 39, 43.

It is submitted that no good ground for certiorari has been shown; that the writ should be dismissed; that the judgment herein should be affirmed in all respects.

Respectfully submitted,

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APPENDIX.

Arthur Train's "From the District Attorney's Office" (p. 415) says:

> "Yet these considerations are of slight moment in contrast to that most crying of all present abuses—the domination of the courtroom by the press. It is no fiction to say that in many cases the actual trial is conducted in the columns of yellow journals and the defendant acquitted or convicted purely in accordance with an 'editorial policy.' Judges, jurors, and attorneys are caricatured and flouted. There is no evidence, however incompetent, improper, or prejudicial to either side, excluded by the judge in a court of criminal justice, that is not deliberately thrust under the noses of the jury in flaring letters of red or purple the moment it leaves the courtroom. The judge may charge one way in accordance with the law of the land, while the editor charges the same jury in double-leaded paragraphs with what 'underwritten' law may best suit the owner of his conscience and his pen."

"Trial by Newspaper" (66 United States Law Review 374), the author being Stuart H. Perry, who was first a lawyer, then managing editor of a newspaper, publisher of another, and finally a director of the Associated Press and a member of the advisory committee of the Columbia University School of Journalism, says, in part, at page 377:

> "Trial by newspaper has always been recognized by sound thinkers as pernicious. Yet we are still afflicted, and in an increasing degree, with an evil that has been an object of continual protest and warning for a century. It is a disease that does not cure itself."

And at page 379:

> "Trial by newspaper could be stopped tomorrow, if judges would use the contempt powers that are in their hands. Why they do not is thus clearly stated by Clarence Darrow:
>
> "'Trial by jury is rapidly being destroyed in America by the manner in which the newspapers handle all sensational cases. I don't know what should be done about it. The truth is that the courts and the lawyers don't like to proceed against newspapers. They are too powerful. As the law stands today there is no important criminal case where the newspapers are not guilty of contempt of court day after day. All lawyers know it, all judges know it, and all newspapers know it. But nothing is done about it. No new laws are necessary. The court has full jurisdiction to see that no one influences a verdict or a decision. But everyone is afraid to act.'
>
> "The reason why they fear the power of the newspapers is because that power is political power. It affects public opinion, and therefore it controls votes. Thus, the poison of politics which causes trial by newspaper also prevents its cure."

The views of enlightened newsmen are interesting. For instance, an article by William Allen White, entitled "How Free Is the Press?", beginning at page 16 of the issue of Collier's for April 8, 1939, contains this at pages 88-89:

> "The old editor, horsewhipped, shot at, sued for libel, has passed out of our civilization with the king's fool and the minnesinger, the jousting knight and the chimney sweep. More than that, the implications of

property in the words 'the press' carry heavy social as well as economic rights. The bank, broker, oil-man or capitalist who buys a newspaper buys something more than the presses. The modern publisher buys the right to hire and fire editors who have served their apprenticeship, who know and should respect the code of the profession. For they, being for the most part innocent of property, are still professional men. The publisher buys their professional equipment with the presses and linotypes. By reason of his property rights he can direct these professional editors.

"And there's the rub. For all these hired editorial minions—that is to say managing editors, editors in chief, desk men, reporters and editorial writers—he, the publisher, holds under his directing hands. He may own also a steel mill or a bank. He may operate a chain of newspapers or a block of real estate or own a big box full of bonds. We professional journalists who work for him watch the baton that he wields. We watch his directing baton because he has power. Too often his qualities become idealized by those who serve him. All journalism from top to bottom almost instinctively and quite unconsciously tends to be affected with the owner's sense of property.

"Thousands and tens of thousands of editors, advertising salesmen, circulators, reporters and copy choppers seem to have forgotten their professional habits, customs and inhibitions in a business that by reason of its size and strength has finally become first of all an investment. But often other thousands and tens of thousands of men and women in our profession realize things that many publishers forget."

Again at page 89:

> "But the social bias often comes with a property sense in the heart of the investing publisher. He is sadly liable to let his sense of property bias his instinct for justice. Then that modern caliph of Bagdad creates another problem. The problem of the newspaper as an investment rather than a profession puts the question of the new freedom of the press in a nutshell."

A complement to Mr. White's article is found in Fortune for August 1939 in an article entitled "The Press and the People—A Survey". The Fortune article contains this among its introductory paragraphs (p. 64):

> " 'So far as the freedom of the press is concerned, there has been more cant written than on most subjects, and that is saying a good deal', said the editor of the New York Herald. That was in March, 1876. Press freedom is still being held up as the day's burning issue by leaders of the industry, but now, as then, eloquent self-critics see it differently. Mark Ethridge, general manager of the Louisville Courier-Journal and Times, told the University of Missouri School of Journalism last May that the cry nowadays about freedom of the press 'is equivalent to the American Army going into the World War shouting "Free the Slaves". . . . The Press in America can lose its freedom, of course, but if it does, it will be primarily its own fault. The freedom of the press can be lost through economic adversity . . . that comes from bad management, from lack of adaptability.' William Allen White put it even more sternly: 'If a free press is in danger, we need not fear outside sources. We need to fear ourselves'."

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Supreme Court of the United States

October Term, 1941
No. 3

THE TIMES-MIRROR COMPANY, a Corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the Supreme Court of California.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF ON REARGUMENT.

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Supreme Court of the United States

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Respondent.

On Writ of Certiorari to the Supreme Court of California.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF ON REARGUMENT.

Neither respondent's oral argument nor its brief filed subsequent thereto related to matters not fully covered by petitioners' briefs, with the exception of respondent's contentions:

1. That the *Sinclair*[1] and *Cox*[2] cases require an affirmance of the judgment, and

2. That the California statute prohibiting summary punishment for constructive contempt by publication must be ignored.

---

[1]*Sinclair v. United States*, 279 U. S. 749.

[2]*Cox v. New Hampshire*, 312 U. S. 569.

The Holding in the Sinclair Case Is Not Controlling—The Case Did Not Involve the Exercise of Any Constitutional Right.

Upon oral argument and in brief filed subsequent thereto, respondent insists that the *Sinclair decision* is controlling because it applied the reasonable tendency standard to the facts there presented. In the *Sinclair case* the court was dealing with jury-shadowing—a right not guaranteed by the federal constitution. Jury-shadowing contributed to the mistrial.[3] In the instant case constitutional guarantees are involved, viz., freedom of speech and of the press—"the indispensable condition of nearly every other form of freedom."[4] In the regulation of most activities, governmental authorities have broad discretion, but not where freedom of speech and of the press is concerned.[5]

Cox v. New Hampshire Does Not Support the Judgment Under Review.

In *Cox v. New Hampshire*, 312 U. S. 569, the constitutionality of the New Hampshire parade-licensing statute was unanimously upheld as applied by the state court to the facts of the case. Respondent asserts that this decision

> "marked out a clear pathway for a correct solution of this case."
>
> (Br. Rearg. 44.)

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[3]279 U. S. at 756 and 760.

[4]Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. 319, at 327.

[5]*Schneider v. State*, 308 U. S. 147, at 161; concurring opinion of Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, at 377-378.

We understand the opinion does not approve abridgment of freedom of speech. Freedom of speech was not curtailed. The opinion points out that the state statute neither in purpose nor effect restricted the right of the individual to communicate views (312 U. S. at 573, 575 and 578). The conduct for which a license was required was the concerted activity of participating in a parade, and not the exercise of free speech. The statute was specific in its requirements and its enumeration of forbidden acts. No one was obliged to speculate as to what constituted a violation of its terms.

In Determining the Declared Policy of the State of California, the Court Should Consider Subdivision 11 of Section 1209, Code of Civil Procedure.

Upon oral argument and in our Brief on Reargument, we contended that the public policy of California, in so far as the legislature is able to declare, appears in subdivision 11 (formerly 13) of Section 1209, *Code of Civil Procedure*.[6] Respondent replies that

> "Subd. 13 has the same place in California jurisprudence as if it had never been enacted."
>
> (Br. Rearg. 51.)

Respondent argues that subdivision 8 of Section 1209 of the *Code of Civil Procedure* creates a statutory standard

---

[6]Subdivision 11: "No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

for constructive contempt by publication.[7] The California courts in opinions in the *Times* and *Bridges* cases made no reference to subdivision 8 of Section 1209. Obviously, the legislature intended public policy to be expressed by subdivision 11. This subdivision expresses the intention of the legislature. Despite the state court's refusal to follow the statute and its holding that the statute is invalid,[8] the legislature, subsequent to the court's declaration that the statute is invalid, has twice reenacted the statute in its original tenor (*Stats. 1907*, p. 319, and *Stats. 1939*, p. 2731). It is a well established rule that the legislature at the time of reenactment of this subdivision had in mind the existing judicial decisions declaring the act unconstitutional.[9] Counsel for respondent on reargument mistakenly declared that the legislature had not reenacted the statute since it had been held unconstitutional by the courts.

In *Baird v. Hutchinson*, 179 Ill. 435, Section 96 of the Election Laws, providing that the Supreme Court should determine election contests of *Superior Court* judges, was held unconstitutional. Section 98 of the Election Laws provided that the county court should hear election contests of "all other officers for the contesting of whose election no provision is made." It was contended that Section 98 authorized the county court to determine election contests involving *Superior Court* judges. The Il-

---

[7]Subdivision 8: "Any other unlawful interference with the process or proceedings of a court."

[8]*In re Shortridge* (1893), 99 Cal. 526; *In re San Francisco Chronicle* (1934), 1 Cal. (2d) 630.

[9]*McColgan v. Jones, Hubbard & Donnell, Inc.* (1938), 11 Cal. (2d) 243, 247; *Anderson v. Jameson Corporation* (1936), 7 Cal. (2d) 60, 67.

linois Supreme Court declared that to ascertain the intent of the legislature, the entire statute should be read, *including* Section 96, which had been declared unconstitutional.

> "* * * the value of an invalid section as an indication of the intention of the law-making body is in nowise diminished by the fact it is discovered, after the enactment of the law, it was not within the power of the legislature to enact it. 'The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and validity to a provision of the law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional section of a statute is "stricken out." For all the purpose of construction it is to be incorporated as a part of the act. The meaning of the legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law.' (Dombaugh v. State, 20 Ohio St. 167.) Clauses, provisions or sections of an act, though unconstitutional and void, are to be considered in construing valid clauses, provisions or sections of the same act, in order to determine the legislative will. Swift v. Calnan, 102 Iowa, 212; Commonwealth v. Potts, 76 Pa. 164."
>
> 179 Ill. 440.

This principle of statutory construction is stated in 2 *Lewis' Sutherland Statutory Construction*, 2nd Ed., pp. 859-860.

CONCLUSION.

The reasonable tendency test is too vague and uncertain to meet the requirements of due process; it unnecessarily restricts and abridges the exercise of freedom of speech and press. Such undue restriction is not necessary to the maintenance of an independent judiciary. Application of the clear and present danger doctrine will protect freedom of speech and of the press and will not impair the integrity or independence of the courts. The record herein does not show that the editorials in question had a reasonable tendency to interfere with the orderly administration of justice.

It is respectfully submitted that the judgment of the Supreme Court of California should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 64

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

BRIEF OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
As Amicus Curiae,
By ELISHA HANSON, *Counsel for Amicus Curiae.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

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vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

BRIEF OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

This brief is submitted by the American Newspaper Publishers Association as Amicus Curiae in support of the petition for a writ of certiorari filed by The Times-Mirror Company, a corporation, and L. D. Hotchkiss, in the above entitled case.

Statement of the Case.

In the interest of brevity the Amicus Curiae relies upon the statement of the case as set forth in the petition for a writ of certiorari herein.

Interest of the Amicus Curiae.

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 425 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States.

The Association is vitally interested in a clarification by this Court of the fundamental issue presented in this case, namely, the limits of editorial comment by newspapers upon matters of great public importance pending in or decided by the courts.

The function of the daily newspaper press is the gathering and dissemination of information in the form of news, editorial comment and advertising.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

The Amicus Curiae submits that the judgments of conviction for contempt here sought to be reviewed constitute an abridgment of the foregoing functions of a free press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

ARGUMENT.

Point I.

The exercise of the judicial power to punish for constructive contempt by publication must conform to the Federal constitutional guarantee against abridgment of the freedom of the press.

The history of the struggle for a free press reveals that the framers of the Bill of Rights wrote the First Amendment to the Federal Constitution to prohibit every conceivable form of abridgment of freedom of the press. *Any restraint from any source and by any method* was considered repugnant to the constitutional guarantee. Accordingly, the grant of immunity exempts the press from previous executive and legislative restraint and protects the press against punishment subsequent to a publication which does not constitute a clear abuse of the liberty of the press. *Near* v. *Minnesota*, 283 U. S. 697 (1931).

The historical background of the First Amendment compels the conclusion that the foregoing constitutional limitations operate upon the judicial as well as the executive and legislative branches of the government.

This is especially a matter of grave concern as applied to the summary judicial power to punish for constructive contempt by publication. Unless that power is exercised with utmost delicacy and caution it may easily operate as a previous restraint upon publication and as a subsequent punishment for publications which are not detrimental to the public welfare.

In recent years this Court has affirmed and reaffirmed its determination "to preserve an untrammeled press as a vital source of public information". *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1937), where this Court said at page 250:

> "The newspapers, magazines and other journals of this country, it is safe to say, have shed and continue

> to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."

See also *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *The State* (*Town of Irvington*), 60 Sup. Ct. 146 (1939); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937).

In performing the essential functions of the press, publishers are merely trustees of the right of the people to have information on matters of public importance free from the censorship of those in authority.

The Amicus Curiae fully recognizes the equal importance of preserving the independence of the judiciary and its freedom from interference in fearless and impartial administration of justice. It is not necessary to subordinate either right to the other. But the condemnation by this Court of executive and legislative restraints invoked against the press makes it plain that it will not countenance judicial restraints upon fair and honest comment on public questions involved in judicial proceedings. This Court has said that the constitutional guarantee of a free press is not to be taken lightly. In balancing the right to a free press against the independence of the judiciary the decisions of this Court unmistakably demonstrate that judicial power to punish for contempt by publication will be confined to clear cases of abuse.

If this judicial power is not thus confined, the guarantee of a free press will be seriously undermined. Publishers will become subservient to the will of judges who are sensitive to criticism or aloof from the democratic check of public opinion. In proceedings for contempt by publication the ultimate responsibility for a proper balance between

an unfettered press and an independent judiciary rests upon the courts themselves and their own sense of self-restraint. Since a free press, together with free speech and free assembly, constitutes "the security of the Republic, the very foundation of constitutional government" (*De Jonge* v. *Oregon*, 299 U. S. 353, 364 (1937)), it is wiser to cast the balance in its favor than in the direction of restriction.

Point II.

The editorials in question in this case are not punishable as contemptuous publications when measured by any of the tests applied by this Court. Therefore, the convictions for contempt are in violation of the constitutional guarantee of a free press as set forth under Point I.

In the interest of conciseness the Amicus Curiae adopts the summary of the contents of the editorials in question as set forth in the petition for certiorari and brief in support thereof.

Out of a great volume of editorial comment and criticism printed in the columns of the newspapers of this country, only an insignificant percentage of these publications have been questioned by the courts in contempt proceedings. In such instances the courts have almost universally confined punishment for contempt to cases where the publication is clearly and unmistakably beyond the limits of legitimate comment and criticism.

It is of paramount importance to the press of this country that the same definite and certain standards which this Court has recently applied in setting aside executive and legislative infringements of free press and free speech should be made equally applicable to judicial action in contempts by publication.

In its vigilance over fundamental personal rights and liberties this Court has never failed to bring doubtful prec-

edents of an earlier date into harmony with the mandates of the Constitution.

In *Herndon* v. *Lowry*, 301 U. S. 242 (1937), this Court finally clarified the criteria and adopted the test of "clear and present danger" in cases involving freedom of speech. It specifically rejected standards so "vague and indefinite" as to spread a "dragnet which may enmesh anyone".

The application by the Supreme Court of California to the editorials in the present case of the test of "reasonable tendency" to interfere with the orderly administration of justice requires a determination by this Court of the relevancy of the test of *Herndon* v. *Lowry*, *supra*, to contempts by publication.

The Amicus Curiae perceives no ground upon which the judiciary in exercising its contempt power can insulate itself against the constitutional limitations imposed upon the other two branches of our government. Such an anomalous doctrine would make the judiciary paramount to the Constitution and to the government of which it is an integral part.

If the press is to remain truly free, the line of demarcation between privileged comment and abuse of liberty must be drawn by a definite and certain standard of guilt. Otherwise, publishers will be constantly exposed to the peril of having remote inferences and unfounded innuendoes read into editorial comments by judges who are prone to exercise censorship in the mistaken belief that the independence of the judiciary is at stake. The "clear and present danger" test affords protection against subtle encroachments of nebulous standards applied by oversensitive judges. The brooding omnipresence of fear engendered by the test of "reasonable tendency" might have such a deterrent effect upon free and timely editorial discussion of cur-

rent public questions as to reduce freedom of the press to "a mere intellectual abstraction" and an empty phrase.

Only brief reference will be made to the cases in which this Court has reviewed questions of contempt by publication. The Amicus Curiae is convinced that *Patterson* v. *Colorado*, 205 U. S. 454 (1907), and *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (1918), are not directly responsive to the issues presented in this case and are distinguishable on their facts. More important is the fact that the views there expressed require clarification in the light of the present doctrine of this Court as announced in *Herndon* v. *Lowry*, *supra*, and the conflicting statements of the State courts which have passed upon publications affecting the judiciary. Compare the instant case with *State* v. *American News Company*, 64 So. Dak. 385, 266 N. W. 827 (1936); *Nixon* v. *State*, 207 Ind. 426, 193 N. E. 591 (1935).

Patterson v. *Colorado*, *supra*, and *Toledo Newspaper Co.* v. *United States*, *supra*, antedate the basic decisions of this Court in the line of cases beginning with *Near* v. *Minnesota*, 283 U. S. 697 (1931) and ending with the most recent decision in *Schneider* v. *The State (Town of Irvington)*, 60 Sup. Ct. 146 (1939).

The substantial Federal question of constitutionality raised by the petition in this case calls for a review of the earlier opinions of this Court in constructive contempt cases in relation to the more recent doctrine enunciated by this tribunal in the free press and free speech cases mentioned above.

The Amicus Curiae respectfully submits that the editorials in this case are not punishable by *any* of the tests applied by this Court. Regardless of what test is applied, the editorials are clearly within the limits of permissible comment and criticism.

It is well established that whether or not publications are contemptuous will be determined by a fair interpretation of the language used. The words will be construed in their context and the general tone of the statements will be considered as well as all the pertinent circumstances surrounding their publication. When the proceeding is criminal and punitive in nature, every intendment consistent with the defendant's innocence should be indulged. Moreover, the meaning of the language is viewed from the standpoint of a strong judge, "a man of ordinary firmness of character". Mr. Justice Holmes, dissenting, in *Toledo Newspaper Co.* v. *United States, supra.*

The three editorials upon which the judgments of conviction are based are entirely free from any of the features which exceed the bounds of legitimate editorial analysis and opinion. None of them scandalizes the court, impeaches the integrity of any judge, imputes improper motives or utters threats. One could hardly imagine a case where the publications in question are so clearly and unmistakably free from elements which have been challenged by the courts as contemptuous.

The editorial "Sit-Strikers Convicted" merely records a forceful but not intemperate approval of a jury verdict which is in accord with the long established policy espoused by The Times-Mirror. It represents an irreducible minimum of the kind of comment without which a newspaper cannot perform its function as a molder of community opinion on disputed questions of social and economic policy.

The editorial "The Fall of an Ex-Queen" is typical of numerous comments in newspapers of the anti-social affects of political "bossism". It merely points to the moral that the over-ambition for political power of a certain woman was responsible for her downfall.

The editorial "Probation for Gorillas" voices the opinion that the good of the community requires a denial of a pending petition for probation, a matter on which informed opinion is often sought from any interested party. No attack is made upon the judge's character nor is he charged with prejudice or political bias and there is no threat of retaliation. The editorial is a proper exercise of the function of the press in presenting views on a vital public issue in the field of criminal law enforcement where complaints about ill-advised clemency are frequently expressed.

The record does not show that any of the judges before whom the related cases were tried, read, or even heard of the editorials at the time they were published. It was not shown that any of the judges complained that he was influenced or embarrassed by the editorials.

The conclusion that the editorials in question fall within the scope of permissible comment and criticism upon issues of far-reaching public importance is inescapable.

This Court has said:

> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1937).

The Amicus Curiae is confident that this Court will not suffer the press to be fettered by the judiciary upon which rests the ultimate responsibility for reconciling its own independence with the commands of the Constitution. Suppression of free discussion of public questions is a grave peril to all democratic institutions, including the courts themselves. Freedom of the press is not a special privilege of any class. Rather it is the right of the people and one not lightly to be curtailed.

Conclusion.

The questions presented by the petition for certiorari herein are of such substantial importance as to justify review by this Court.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
As Amicus Curiae,
By ELISHA HANSON, *Counsel for Amicus Curiae.*

April —, 1940.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 972

THE TIMES-MIRROR COMPANY, a corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Memorandum of American Civil Liberties Union, Southern California Branch, as Amicus Curiae, in Support of Petition for Certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. .....

THE TIMES-MIRROR COMPANY, a corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

Memorandum of American Civil Liberties Union, Southern California Branch, as Amicus Curiae, in Support of Petition for Certiorari.

Preliminary Statement.

The Southern California Branch of the American Civil Liberties Union, with leave of the California courts below, appears as amicus curiae, both in the Superior Court of Los Angeles County and in the Supreme Court of California. We urged upon the California courts the rejection of the "tendency" doctrine—commonly designated as the "dangerous tendency" or "inherent tendency" rule. We advocated the adoption of either the "actual obstruction" principle, or the "clear and present danger" rule, to alleged

contempts by publication. Both these tests were rejected by the Supreme Court of California.[1]

The petitioner herein apparently contents itself with reliance upon the latter rule alone; this memorandum will be directed, accordingly, to a discussion of the "actual obstruction" test.

The Interest of the American Civil Liberties Union, Southern California Branch.

The Southern California Branch of the American Civil Liberties Union is an organization of citizens in California who are concerned with the preservation and extension to all, of constitutional liberties as guaranteed by the Bill of Rights in the Constitution of the United States. The political philosophy of most of its members is commonly designated as "liberal."

The "Los Angeles Times" is an old, wealthy and powerful daily newspaper. Its political philosophy is "conservative."

For over half a century the "Times" has been a vigorous and active mouthpiece of the anti-labor and open-shop employer interests of Southern California. For fifty years it has had much to say in its editorial columns upon many public issues. Not once, however, has it ever raised its voice in defense of freedom of speech for anyone other

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[1]Opinion of the Supreme Court of Calif., *Times-Mirror Publishing Co. v. Superior Court*, 99 Cal. Dec. 108.

than for itself and for those in its, and its publisher's economic class. When Yetta Stromberg,[2] California radical; Angelo Herndon,[3] young Communist; Amy Lovell,[4] religious fanatic, and Kim Young,[5] Los Angeles student, asserted that they had been deprived of freedom of speech, the "Times" maintained a studied silence. Now that its own freedom is affected it protests stoutly that its freedom of speech has been abridged by its conviction for contempt of court. The American Civil Liberties Union joins in the protest, however. The Civil Liberties Union wants it clearly understood however that its appearance is as a "friend of the *Court*," and *not* as a friend of the *"Times."*

The explanation for this appearance by the Union is because we believe with Mr. Justice Holmes that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate. . . ."[6]

Because we try to practice what we preach, this memorandum is submitted, with leave of court, in *support* of the petition for certiorari.

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[2]*Stromberg v. Calif.*, 283 U. S. 359.

[3]*Herndon v. Lowry*, 301 U. S. 242.

[4]*Lovell v. Griffin*, 303 U. S. 444.

[5]*Schneider v. State*, and *Young v. Calif.*, 84 L. Ed. Adv. Op. 115. and more often quoted version of this point of view is attributed to Voltaire, and is to the effect: "I hate what you say, but I will defend with my life your right to say it."

[6]*United States v. Schwimmer*, 279 U. S. 644. The more familiar

Argument.

The "Actual Obstruction" Principle Is the Correct Test to Be Applied to Alleged Contempts of Court by Publication.

It was Justice Holmes who, with Justice Brandeis, fathered the "actual obstruction" principle as applied to contempt by publication.

Dissenting (with Justice Brandeis) in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, he asserted that an *actual* obstruction of justice was necessary in order to support a conviction for contempt of court based upon discussion of a pending case.

Justice Holmes could not find any evidence in the case that there was "anything that obstructed the administration of justice in any sense" that he could possibly give to those words.

Because in his opinion "there was no emergency" and "there was nothing to warrant a finding that the administration of justice was obstructed" he joined with Justice Brandeis in urging the reversal of the conviction.

Two liberal state courts have adopted the Holmes-Brandeis view. Thus, the Supreme Court of South Dakota, in *State v. American News Company*, 64 S. D. 385, rules: "that any publication, to be punishable as contempt, should be embarrassing or obstructive to the administration of justice in a pending case, and *obstructive in fact rather than in theory or by possibility.*" (Italics ours.)

We quote further from the opinion:

> ". . . We believe that in all contempt cases the distinction should be borne in mind throughout be-

tween a merely defamatory publication and an *actually obstructive publication.* We think the courts should reserve the use of the weapon of contempt for such publications as can fairly and reasonably be said in point of *actual fact* to intimidate, influence, impede, embarrass, or obstruct the court in the due administration of justice in an actually pending matter. And we entertain the opinion that if error is made in either direction in determining that question, it is better and wiser to err in favor of absolute and unrestricted freedom of speech rather than in the other direction. . . . (Italics ours.)

Similarly, the Supreme Court of Indiana is in accord with the requirement that an actual interference with the Court is necessary to support a conviction for contempt of Court by publication.

That Court decided in *Nixon v. State*, 193 N. E. 591:

"The right to fully comment and criticize the action, opinions, and judgments of courts is of primary importance to the public generally. It is not only good for the public, but has a salutary effect upon the courts and judges as well. Courts and judges are not and should not be above criticism, and as long as they are not impeded in the conduct of judicial business by publications having the direct tendency and *effect* of obstructing enforcement of their orders and judgments, or of impairing the justice and impartiality of verdict, there is no right to enforce a contempt proceeding.

"We do not think it is the policy of the law to unduly extend the doctrine of contempt proceedings as applied to publications claimed to impede, interfere with, or embarrass the administration of justice. It must clearly appear that such publications *do* impede,

> interfere with, or embarrass the administration of justice before the author of the publication should be held for contempt." (Italics ours.)

This actual obstruction test was in effect adopted by Justice Gibson dissenting below. He urged the reversal of the petitioners' conviction for contempt on the ground that

> "no evidence of actual interference with any legal proceeding was produced. . . . No judge seems to have felt the pressure of improper influences. No disturbance of judicial calm occurred until after the accusations were filed.
>
> "All this is indicative of the lengths to which imagination may go in building groundless fears and in imputing potent and obstructive purposes foreign to the intent of the writer. I think that by our decision in this and the Bridges case we have sacrificed a substantial part of our cherished freedom of speech and press in order to stamp out an evil that does not exist."

The advantage of the actual obstruction test lies in its simplicity, clarity and ease of enforcement. Here we have no standard so vague and indefinite as to constitute a "dragnet" to enmesh any newspaper publication which a judge may later deem ill advised. No one questions the authority and duty of a court to take appropriate steps to penalize actual interferences with the administration of justice; no newspaper publisher, nor the staunchest champion of freedom of the press, justifies *actual* obstruction of justice: *actual* interference with the judiciary through publication clearly constitutes an *abuse* of free-

dom of the press.[7] The rule clearly safeguards freedom of the press; at the same time it adequately protects the judiciary and the administration of justice from all actual encroachments, interferences and dangers.

To paraphrase Jefferson,[8] the rationale of this test is that "it is time enough" for the judges to step in when the expression of opinions concerning pending causes "break out" into actual interference with the courts. The rule reconciles the authority of the judiciary with the freedom of the press.

Because the California courts rejected the actual obstruction principle as applied to the alleged contempt by the petitioners, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

A. L. WIRIN

Attorney for American Civil Liberties Union, Southern California Branch, Amicus Curiae.

LEO GALLAGHER,

GROVER JOHNSON,

Of Counsel.

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[7] "Legislative intervention (affecting freedom of speech) can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge v. Oregon*, 299 U. S. 353.

Constitutional prohibition against legislative encroachment upon freedom must apply equally against judicial abridgment if we are to have a government of laws and not of judges.

[8] cf. *Reynolds v. United States*, 98 U. S. 163.

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Supreme Court of the United States

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THE TIMES-MIRROR COMPANY, a corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AND ITS SOUTHERN CALIFORNIA BRANCH, AS AMICI CURIAE.

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Supreme Court of the United States

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The American Civil Liberties Union and its Southern California Branch, with leave of the California courts below, appeared as amici curiae, both in the Superior Court of Los Angeles County and in the Supreme Court of California. We unsuccessfully urged upon the California courts the rejection of the "tendency" doctrine—commonly designated as the "dangerous tendency" or "inherent tendency" rule and the adoption of either the "actual obstruction" principle, or the "clear and present danger" rule, to alleged contempts by publication.

The Interest of the American Civil Liberties Union, and its Southern California Branch.

The American Civil Liberties Union is an organization of citizens who are concerned with the preservation and extension to all, of constitutional liberties as guaranteed by the Bill of Rights in the Constitution of the United States. The political philosophy of most of its members is commonly designated as "liberal." Its Southern California Branch has a particular interest in this case because the "Los Angeles Times" has, for over half a century, been a vigorous and active mouthpiece of the anti-labor and open-shop employer interests in Southern California. For fifty years it has had much to say in its editorial columns upon many public issues. Not once, however, has it ever raised its voice in defense of freedom of speech for anyone other than for itself and for those in its, and its publisher's economic class. When Yetta Stromberg,[1] California radical, and Kim Young,[2] Los Angeles student, asserted that they had been deprived of freedom of speech, the "Times" maintained a studied silence. Now that its own freedom is affected it protests stoutly that its freedom of speech has been abridged by its conviction for contempt of court. The American Civil Liberties Union and its Southern California Branch join in the protest. We want it clearly understood, however, that our appearance is as a "friend of the *Court*," and *not* as a friend of the "*Times*."

The American Civil Liberties Union is submitting a brief in this case, as well as in the companion case of *Bridges* v. *California*, No. 19, because it believes that the issues raised in these cases are of supreme importance in connection with freedom of speech and of the press. Since the basic legal problems in both cases are the same we shall

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[1] *Stromberg* v. *Calif.*, 283 U. S. 359.

[2] *The Leaflet Cases, Young* v. *Calif.*, 308 U. S. 147.

not here repeat the arguments developed in the *Bridges* brief. We there contended that the power to punish for contempt of Court is subject to the same constitutional restrictions as is the legislative power to punish for crime and that in the absence of a showing that there was "a clear and present danger" of interference with the freedom of the judiciary, punishment was improper.

The Issues.

The observations there made are particularly appropriate here, since this case, unlike the *Bridges* case, deals with a comment by a newspaper on matters of general public concern. This Court has repeatedly recognized the importance of a free press. As was said in *Grosjean* v. *American Press Company*, 297 U. S. 233, at 250:

> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In consequence a tax law was declared void because aimed at a particular kind of newspaper.

Again in *Thornhill* v. *Alabama*, 310 U. S. 88, it was said:

> "Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the process of popular government."

And judges, as well as legislators, may well give heed to the will of the people as expressed through the give and take of newspapers and periodical discussion.

We shall, therefore, concern ourselves in this brief primarily with an analysis of the various articles challenged as being contemptuous. These were originaliy five in num-

ber (R. 9-25); two additional charges were filed growing out of the contempt proceedings themselves (see R. 138). The Trial Court held that only three of the original charges constituted contempts (R. 60). The Appellate Court upheld the charge as to these three articles but reversed the conviction based upon the additional charges (R. 139)—in consequence the record in connection with those two additional charges is not before this Court.

The Editorials.

1. The first charge was based upon an editorial which approved as a warning to union terrorists a jury verdict convicting sitdown strikers. The editorial was written before the expiration of the time for the defendants to move for a new trial and before the date fixed for sentence. It was charged that the editorial had been written to induce the judge to give a strong sentence. The editorial is to be found in the record at page 11. There is no suggestion in the editorial whatever directed toward action by the judge. It in substance reiterated sentiments of gratification over the verdict expressed in a radio address by the District Attorney who prosecuted the case (see R. 11)—and it does not appear that any contempt proceedings were instituted against the District Attorney. The Trial Judge himself apparently found no need to institute proceedings of contempt against anyone and there is no proof that he saw the editorial in question.

The Court which tried the charges found this editorial to be contemptuous in part because it might influence the judge in fixing sentence or granting probation (R. 111) and in part because prospective jurors on a possible second trial would have been influenced by the editorial (R. 110). The Appellate Court upheld the charge of contempt on the ground that the editorial was "capable of being construed" that no leniency should be extended to the defendants

and that if such leniency were extended the judge would be criticized (R. 128).

Even within the test laid down by the California courts, a test we believe this Court will repudiate, it is difficult to see how an editorial such as this could reasonably affect any judge improperly. Surely under any doctrine which has a proper regard for the constitutional guaranty of a free press, this editorial cannot be found to be contemptuous. Otherwise newspapers must avoid all comment on legal proceedings, whether favorable or adverse, until the last legal step shall have been taken, though that be years after the original verdict. It is not possible, either on logical grounds or those of expediency, to draw any line once the jury has performed its functions. If it is not permissible to criticize a trial judge because he has under consideration a motion for a new trial, then it must likewise be impossible to criticize the decision of the trial judge while there is pending an appeal in the higher courts and so on until every legal recourse has been exhausted, including applications to this Court and applications for rehearing. And even then it can be argued that newspaper comments on a particular decision will influence the judges who participated in it in their future decisions—for if the newspaper expresses its opinion, whether favorable or adverse, it will indicate clearly to the judges what is expected of them in similar situations in the future. But, of course, no such absurd result is possible. The best way to prevent it, however, is to stop at the threshold the application of the nonsensical doctrine that any comment about a case under advisement by a judge constitutes a contempt.

2. The Trial Court having sustained a demurrer to the second count we shall now deal with the third. The editorial here involved (R. 17) is of the same character as that already considered: approval of a verdict before sentence, again without any suggestion as to the sentence itself. In discussing this editorial the Trial Court also com-

mented upon the fact that the editorial referred to the past political activity of one of the defendants, matters not involved in the criminal case. The Court said that the discussion of such extraneous matter was prohibited (R. 113). In the Appellate Court this editorial was held contemptuous because it "would have a disturbing effect upon the judge before whom the case was pending" (R. 130). This conviction is all the more remarkable because the article in question did not, as did the first editorial, deal at length with the pending case—indeed no specific mention is made of it, although it was undoubtedly in the mind of the writer and included in the casual reference to criminal prosecutions. Essentially this editorial consists of the review of the career of one of the defendants, a minor political boss. To punish the publication of such matter would be to prevent the discussion of the affairs of any public character during the time that legal proceedings involving that public character might be pending. Surely judicial independence neither needs nor is entitled to any such protection.

3. The last of the editorials upon which the contempt conviction rests is the only one which urges any action by the judge involved. That editorial (R. 23) approved a conviction of some labor racketeers and (R. 24) said that the trial judge "will make a serious mistake if he grants probation." The article was held contemptuous because written while the judge had before him an application for probation (R. 116). In the Appellate Court it was said that little "can be said" in defense of the publication of that editorial. It was described as an example of "intimidation" which had been condemned by this Court in *Patterson* v. *Colorado*, 205 U. S. 454 (R. 131). We cannot believe that decision still to represent the views of this Court.

The Appellate Court rejected petitioner's argument that it had the same right in its newspaper to express its views

concerning the attitude of the judge toward an application for probation as any member of the community had (R. 132). The Court was unable to find any basis for such contention, indicating that if permissible there might be a heated newspaper controversy while the question of probation was before the Court for determination. The Appellate Court, however, rested its decision not merely on this consideration, but also on the fact that sentence had not yet been imposed. Thus the third editorial was held contumacious on the same grounds as the Court had held the other two so to be (R. 133).

It should be said, however, in connection with this last editorial that the judge affected saw no need for a prosecution. And, while the language of the editorial was vigorous and emphatic, treatment of the subject was restrained and respectful. We respectfully submit that no suggestion made to a judge with regard to the action he should take, though he be addressed by name, should be considered contemptuous unless, by its tone and manner, it seeks to exert improper pressure upon the judge. Surely judges have the same right to know what is the opinion of the community in which they live as have other officers of government.

Particularly should this be the case where the person charged with contempt has maintained a consistent policy over a long period of years on some of the subjects involved in the cases discussed. An affidavit on that subject was made by Mr. Chandler, the President of the newspaper (R. 42-52). It was not in any way controverted. Nevertheless, the Appellate Court held that it was for the Trial Court to determine what weight should be given to this evidence (R. 134). However, the statement in the opinion that the affidavit merely caused a "conflict in the evidence" is without basis in the record. It is pertinent, moreover, to note that the trial judge did not rest his decision upon any disbelief in the statement contained in this affidavit. He merely said that even though the attitude

of the "Los Angeles Times" had been known in the community, as stated in the affidavit, the language of the editorials, particularly of the last one, was not thereby excused (R. 116).

We have adverted to this because it is our belief that whether or not a particular editorial can reasonably be held to constitute an interference with the independence of the judiciary depends upon all of the circumstances, of which the general policy of the newspaper certainly is one.

CONCLUSION.

It is respectfully submitted, therefore, that the judgment under review should be reversed because to punish as contemptuous the editorials complained of would be an infringement of freedom of the press.

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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

ELISHA HANSON,
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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

This brief is submitted by the American Newspaper Publishers Association as Amicus Curiae in the above entitled case in support of petitioners herein.

Statement of the Case.

In the interest of brevity the Amicus Curiae relies upon the statement of the case as set forth in the brief of petitioners herein.

Interest of the Amicus Curiæ.

The American Newspaper Publishers Association is a membership corporation organized and existing under the

laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 425 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States.

The Association is vitally interested in a clarification by this Court of the fundamental issue presented in this case, namely, the limits of editorial comment by newspapers upon matters of great public importance pending in or decided by the courts.

Among the functions of the daily newspaper press is the gathering and dissemination of information in the form of news and editorial comment.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

The Amicus Curiae submits that the judgments of conviction for contempt here under review constitute an abridgment of the foregoing functions of a free press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions Involved.

The First Amendment to the Constitution of the United States is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT.

Point I.

The exercise of the judicial power to punish for contempt by publication imposes upon the courts the duty of reconciling the constitutional right of a free press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States with the right of the judiciary to maintain its independence and the orderliness of the judicial process. The proper accommodation between these two rights so as to preserve the essentials of both ultimately rests upon the courts themselves and their own sense of self-restraint.

In this case this Court is confronted with the task of reconciling two rights "in order to prevent either from destroying the other." One right is the freedom of the press, which is secured against abridgment by all branches of the Federal and State governments by the First and Fourteenth Amendments to the Constitution of the United States. The other right is that of the judicial branch of the government to maintain its independence and the orderliness of the judicial process. Underlying the reconciliation of these rights lies a balancing of individual and social interests in freedom of discussion on matters of public con-

cern, such as this Court has recognized in other cases involving constitutional guarantees of civil liberties.[1]

In this case much more is at stake than the individual interest of a newspaper publisher in giving expression to his opinions on matters deemed by him to be of vital public importance. Freedom of the press is not a special privilege accorded to a particular class. It reflects a general social interest. Behind it lies the right of the people to have information and opinion on matters of public concern gath-

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[1] A recent case in which this balancing of interests is exemplified is *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). See also, *Carlson* v. *California*, 310 U. S. 106 (1940). The same method was employed by Justice Gibson in his dissenting opinion in the present case in the Supreme Court of California. 98 P. (2d) 1029, 1041 (1940) (R. 140-148).

Professor E. F. Albertsworth, of Northwestern University Law School, has stated the interests involved as follows:

> "In every contempt proceeding, of course, there come into conflict two vitally important social interests. First, the social interest that justice be fearlessly and impartially administered and that the courts be unembarrassed in executing their judgments and decrees; secondly, that fair comment may be indulged in by the public on the reasoning in the opinion as well as the judgment itself, for this fair comment is one of the great safeguards against judicial tyranny and a poor quality of judicial decisions." (1925) 20 Ill. L. Rev. 191.

Another writer has indicated the conflicting interests in the following:

> "If the public may override the courts and sap their strength to the degree that their independence no longer obtains, then the institution of legitimate trial will gradually wither away. But if the courts may so arbitrarily hold themselves aloof from reproach that the popular conception of justice is not at all considered then democracy must merge into autocracy. Of the two, this is the greater danger." Chused, Public Comment as Contempt of Court (1930) 16 St. Louis L. Rev. 24, 48.

> "• • • the best test of truth is the power of the thought to get itself accepted in the competition of the market • • •." Mr. Justice Holmes, dissenting in *Abrams* v. *United States*, 250 U. S. 616, 630 (1919).

> "It is in small encroachments upon the right of free criticism of all the acts of public officials that the real danger lies." Learned Hand, J., in *Ex parte Craig*, 282 Fed. 138, 160 (C. C. A. 2d, 1922).

ered and disseminated through the medium of the press.[2] The protection of the press, therefore, transcends mere individual rights. Historical considerations recognized by this Court unmistakably reveal the paramount significance of the larger objective in the discovery and diffusion of knowledge and opinion on public questions.

The grave importance of the preservation of this bulwark of the democratic process was recently given forceful expression in *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940) where this Court succinctly characterized freedom of speech and of the press as follows:

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them

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[2] Eminent authorities have made similar observations. Judge Cooley has said:

> "• • • their purpose [freedom of speech and of the press] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. • • • The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley, Constitutional Limitations (8th ed.), p. 886 (1927).

Lord Bryce observed:

> "The more completely popular sovereignty prevails in a country, so much the more important is it that the organs of opinion should be adequate to its expression, prompt, full, and unmistakable in their utterances. • • •
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> "The press, and particularly the newspaper press, stands by common consent first among the organs of opinion." 2 Bryce, American Commonwealth (rev. ed. 1927) pp. 274-275.

Professor Zechariah Chafee, Jr., has characterized the right to a free press as "a declaration of national policy in favor of the public discussion of all public questions." Chafee, Freedom of Speech, p. 5 (1920).

> and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."

In balancing the public interest in the dissemination of information through the expression of opinion in the press and the public interest in an independent judicial system, the courts are the guardians of our deeply-cherished liberties. If these interests come into apparent conflict, it is the duty of the courts to make a proper accommodation between them so as to preserve the essentials of both. In the last analysis the ultimate responsibility for arriving at a proper balance between an unfettered press and an independent judiciary rests upon the courts themselves and their own sense of self-restraint.

This is especially true when the courts assert the power to punish for contempt by publication. The origin of this power has been questioned by legal historians[3] and its exercise has been frequently accompanied by widespread dissatisfaction.[4] But even if it is conceded that this power is entrenched in our jurisprudence as one of the so-called inherent powers of the courts, it should be exercised with utmost delicacy and caution because of its very nature.

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[3] Fox, History of Contempt of Court (1927); Thomas, Problems of Contempt of Court (1934).

[4] See Nelles & King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 401, 525; (1938) 48 Yale L. J. 54.

As Justice Gibson, in his dissenting opinion in the Supreme Court of California, aptly said, this venture into summary punishment presents the amazing "spectacle of a judicial officer acting as prosecutor and judge, and meting out punishment besides * * *."[5]

Many writers have shown that this combination of functions is traditionally at war with the conception of fairness in American judicial procedure and that it contains the seeds of arbitrariness and injustice.[6] When applied to the press, the judicial power to punish contempt alleged to have occurred by publication should be scrupulously confined to the clearest cases where the publication is unmistakably beyond the limits of fair comment and criticism on matters of public concern.

The principles heretofore laid down by this Court as guides in balancing a free press against a free judiciary demonstrate that in the present case the lower courts erred in punishing the publications here in question as contemptuous.

Freedom of the press is an historic concept written into our early State constitutions and into the First Amendment to the Constitution of the United States. Today it is a part of the organic law of every State in the Union, guaranteed against abridgment by the due process clause of the Fourteenth Amendment to our Federal Constitution.

In the basic case of *Near* v. *Minnesota*, 283 U. S. 697 (1931), the nature and scope of the freedom of the press

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[5] 98 P. (2d) at p. 1042 (R. 142). Summary punishment for contempt by publication is used herein in the sense of punishment at the discretion of the court as opposed to punishment after conviction by a jury.

[6] See notes 3 and 4, supra. In his dissenting opinion in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 423 (1918), Mr. Justice Holmes said: "When it is considered how contrary it is to our practice and ways of thinking for the same person to be the accuser and sole judge in a matter which, if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case 'to insure order and decorum in their [the courts'] presence' * * *."

guarantee were fully analyzed. In that case this Court for the first time specifically declared that the freedom of the press secured by the First Amendment against abridgment by the United States is also secured by the Fourteenth Amendment against abridgment by a State.

To determine the content of the guarantee, the court looked to the historical background of the First Amendment. Mr. Chief Justice Hughes quoted from Madison to the effect that liberty of the press constituted a grant of immunity from previous executive and legislative restraint or censorship. But this Court made it plain that immunity from prior restraints or censorship does not exhaust the constitutional guarantee. The guarantee extends to any form of abridgment of a free press and protects the press against punishment subsequent to publication which does not constitute a clear abuse of the liberty of the press. In its most recent opinion on the subject in *Thornhill* v. *Alabama*, 310 U. S. 88, 101 (1940), this Court said:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the 'five great rights' and said: 'The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive

> officers are shamed or intimidated, into more honourable and just modes of conducting affairs.' Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

The rationale of *Near* v. *Minnesota, supra,* removes any doubt that a free press applies to encroachments by the judicial branch of the government. Any other doctrine would be anomalous in that it would immunize the judiciary against the constitutional limitations imposed upon the other branches of the government. This would have the untenable consequence of making judges paramount to the Constitution and to the government of which they are an integral part.

Since *Near* v. *Minnesota,* this Court has so frequently affirmed and reaffirmed the foregoing doctrines as to evince a determination "to preserve an untrammeled press as a vital source of public information".[7] In *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250 (1936), the Court said:

> "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. * * *
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> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

[7] *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936); *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938); *Schneider* v. *State (Town of Irvington),* 308 U. S. 147, (1939).

It is especially noteworthy that in its decisions this Court has never sought to distinguish freedom of speech and freedom of the press. In many instances it has applied the same principles to both, citing in support thereof free speech and free press cases.[8]

The most striking feature of this impressive line of decisions is the unflinching determination of this Court to condemn every conceivable form of abridgment of the press from any source and by any method. This is not to assert, as some detractors of this liberty would have it believed, that the constitutional guarantee is so literally absolute as to exempt the press from answerability for abuses to which the general laws apply. Such a claim would be refuted by the expressions of this Court in the *Near* opinion itself, where it was pointed out that the press was subject to laws imposing civil liability for publishing libellous matter.

When this Court said in *Near* v. *Minnesota*, *supra*, that subsequent punishment for such abuses as may exist is the appropriate remedy, it was not unmindful of its solemn responsibility of preserving the right itself. Punishment will be confined to the clearest cases. In *DeJonge* v. *Oregon*, 299 U. S. 353, 364 (1937), this Court said with respect to freedom of speech and of the press:

> "* * * legislative intervention can find justification only by dealing with the abuse. The rights themselves must not be curtailed."

The same admonition applies to the executive and judicial departments of the government. In reconciling the specific command of the Constitution for protection of the free press with the necessity of maintaining an independent judiciary

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[8] For example, see cases cited in *Thornhill* v. *Alabama*, 310 U. S. 88, 95, note 7.

this Court will not lose sight of its frequent reminders that when any abridgment of the right of a free press and free speech is asserted the Court should be astute to examine the effect of the challenge.[9]

In contempt by publication cases judicial scrutiny of the claim of violation of the constitutional guarantee of a free press should be equally searching. This Court will not overlook its warning that the phrase "freedom of speech and press" is not an empty one and was not lightly used.[10]

The Amicus Curiae is confident that in reconciling the competing rights alleged to be in conflict in this case, the court will weigh the right to discuss and criticize in the scale and that it will not countenance an impairment of that right by any standard of judgment which encourages a lack of judicial self-restraint.

Point II.

The "clear and present danger" test is best suited to the reconciliation of a free press and an independent judicial system.

The "clear and present danger" test affords a proper standard to reconcile the right of a free press with that of an independent judiciary.

It is of paramount importance to the press of this country that this Court should adopt and apply to the judicial exercise of the power to punish for contempt by publication the same definite and certain standard which this Court has recently applied in setting aside legislative infringements of free speech. The content of the guarantee is the same in both cases.

If the press is to remain truly free the line of demarcation between privileged comment and abuse of liberty must

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[9] *Schneider* v. *State* (*Town of Irvington*), 308 U. S. 147 (1939).

[10] *Schneider* v. *State* (*Town of Irvington*), *supra*, note 9.

be drawn by a definite and certain standard of guilt. The "reasonable tendency" test applied by the Supreme Court of California exposes the press to the constant threat of having unthought of inferences and implications written into editorial comments by judges who might be prone to exercise censorship in the mistaken belief that the independence of the judiciary is imperiled.

This Court has repeatedly stressed the point that anything that smacks of censorship strikes at the foundation of the freedom of the press, whether the censorship is achieved by licensing or by any other means.

The rationale of *Thornhill* v. *Alabama, supra,* decided by this Court at its last term, makes it plain beyond doubt that the real evil is the brooding omnipresence of fear engendered by a "threat to censor comments on matters of public concern." This Court said (310 U. S. 88, 97):

> "It is not the sporadic abuse of power by the censor but *the pervasive threat inherent in its very existence* that constitutes the danger to freedom of discussion." (Emphasis supplied.)

Since this Court has condemned such a threat when it appears in the form of licensing, it is submitted that a like threat of censorship exists in the application of the "reasonable tendency" test to alleged contemptuous publications.

The Amicus Curiae takes pride in stating that out of a great volume of editorial comment and criticism printed in the columns of the newspapers of this country only an insignificant percentage of these publications has been questioned by the courts in contempt proceedings. However, the issues in this case are not founded upon a quantum of abuses of liberty of the press nor upon actual or alleged sporadic abuses of the judicial power to punish for contempt by publication. Rather, to paraphrase this Court's language in

Thornhill v. *Alabama, supra*, the issues derive from an appreciation of the character of the evil inherent in any form of threat of censorship. Such a threat is inherent in the adoption and application of the "reasonable tendency" test which is not aimed specifically at evils within the allowable area of State control as exercised by its judicial branch.

The "reasonable tendency" test operates as a threat to sweep within its ambit permissible and timely editorial discussion of current public questions. The standard is so vague in its contours and so indefinite as to spread a "dragnet which may enmesh anyone", thus threatening to reduce freedom of the press to "a mere intellectual abstraction" and "an empty phrase".[11]

In an epochal series of decisions involving the constitutional guarantee of free speech, this Court, as recently as 1937, in *Herndon* v. *Lowry*, 301 U. S. 242 (1937), finally clarified and unequivocally readopted the "clear and present danger" test by which speech is penalized only when under the circumstances it produces or is intended to produce a clear and present danger of substantive evils within the allowable area of State control.[12]

The Amicus Curiae respectfully urges upon this Court the adoption and application of the foregoing test to cases involving contempt by publication. Fully recognizing that the maintenance of an independent judiciary is of equal

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[11] The Amicus Curiae submits that Justice Gibson's criticisms of the "reasonable tendency" test are unanswerable. See 98 P. (2d) at pp. 1042-1045 (R. 142-148) and comments (1940) 13 So. Calif. L. Rev. 355; (1938) 48 Yale L. J. 54.

[12] In the decisional line of cases out of which the "clear and present danger" test was finally evolved and readopted as the law of the land, see *Schenck* v. *United States*, 249 U. S. 47 (1919) and concurring opinion of Brandeis and Holmes, J. J., in *Whitney* v. *California*, 274 U. S. 357, 372 (1927).

The "clear and present danger" test was recently reaffirmed in *Thornhill* v. *Alabama*, 310 U. S. 88 (1940) and *Carlson* v. *California*, 310 U. S. 106 (1940). See also *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

importance to the maintenance of a free press, the Amicus Curiae submits that the "clear and present danger" test is best adapted to the adjustment of these two rights.

It has already been shown that no tenable distinction can be drawn between freedom of speech and freedom of the press so far as executive and legislative encroachments are concerned.[13] The Amicus Curiae perceives no basis upon which the courts can constitutionally exempt themselves from the limitations imposed upon the other two branches of the government when dealing with an alleged substantive evil such as an interference with the judiciary by means of contemptuous publications. If anything, the nature of a contempt proceeding is itself a warning against the peril of immunizing the judiciary against the commands of the Constitution applicable to the other two branches of the government.[14]

Nothing is gained in this case by insisting that *Patterson* v. *Colorado*, 205 U. S. 454 (1907), is controlling. In its vigilance over fundamental personal rights and liberty, this Court has never failed to bring doubtful precedents of an earlier date into line with later precedents thought to be more in harmony with the mandates of the Constitution. Since *Patterson* v. *Colorado*, *supra*, decisions of this Court have placed beyond dispute the proposition that freedom of the press as guaranteed by the First Amendment is secured against abridgment by the States by force of the due process clause of the Fourteenth Amendment.[15] In *Patterson* v. *Colorado*, *supra*, Mr. Justice Holmes specifically said that this question was left undecided by the Court. Moreover, in

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[13] *Supra*, note 8.

[14] The rationale of the dissenting opinion of Justice Gibson in the California Supreme Court is unassailable on this point. See 98 P. (2d) at pp. 1042-1043 (R. 141-144).

[15] *Supra*, note 7.

Near v. *Minnesota, supra*, this Court consigned to oblivion the Blackstonian theory adopted by Mr. Justice Holmes in the *Patterson* case that freedom of the press does not comprehend immunity from subsequent punishment for harmless publications.[16] Indeed, Mr. Justice Holmes himself later repudiated this interpretation of the First Amendment.[17] But the test for determining what constitutes harmless publications in contempt proceedings still remains to be clarified.

Further, it should be observed that since this Court dismissed the writ of error in *Patterson* v. *Colorado, supra*, on a jurisdictional ground, Mr. Justice Holmes' comments on the merits of the case must be regarded as *dicta*. In fact, the distinguished Justice sharply modified his view as to the applicable criterion in constructive contempt cases in his dissenting opinion in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (1918).

Even more important than the distinctions just made, is the fact that since *Patterson* v. *Colorado, supra*, and *Toledo Newspaper Co.* v. *United States, supra*, this Court has greatly clarified the boundaries of free speech and free press and has served notice that it will proscribe any form of abridgement thereof. It is apparent, therefore, that in the light of the more recent doctrine of *Herndon* v. *Lowry, supra*, reaffirmed this year in *Thornhill* v. *Alabama, supra*, and in view of the fact that since the *Toledo* case a few State courts[18] have expressed views which are irreconcilable with the principles laid down by this Court in *Herndon* v. *Lowry, supra*, there is pressing need for a clarification of the limits of the judicial power to punish for contempt by publication.

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[16] This exploded theory is forcefully criticized by Professor Chafee in his Freedom of Speech, p. 8, *et seq.* (1920).

[17] See *Schenck* v. *United States*, 249 U. S. 47 (1919).

[18] See (1938) 48 Yale L. J. 54, 60-61.

Point III.

The editorials in question in this case are not punishable as contemptuous publications when measured by the "clear and present danger" test.

In the interest of conciseness the Amicus Curiae adopts the summary of the contents of the editorials in question as set forth in the brief of petitioners herein. Only such analysis of the editorials is attempted as is essential to demonstrate their propriety when measured by the "clear and present danger" test or, for that matter, any of the judicial tests heretofore applied.

The "pervasive threat" inherent in the existence of some form of censorship is strikingly exemplified by the genesis of the proceedings herein. Following a systematic survey of editorials that had appeared in the "Times" over a period of approximately six months, J. Louis Elkins, as Secretary of the Los Angeles Bar Association on May 13, 1938, subscribed to an affidavit alleging that five editorials published by the "Times", including the three here under review, were contemptuous. This affidavit was filed with the trial court on June 3, 1938 (R. 1, 2, 9-25).

One of the editorials was published on December 21, 1937, or approximately six months before the contempt proceeding was initiated (R. 10). Another was published on February 13, 1938 (R. 14), nearly four months prior to the filing of the Elkins affidavit and a third editorial was published nearly two months prior thereto (R. 17).

The manner in which the editorials were brought to the attention of the court gives color to the contention that the Bar Association was prompted not by a deep-seated conviction that any one of the editorials transgressed the limits of permissible comment and criticism on matters of public importance but rather by a dissatisfaction with the long-

established editorial policy of the "Times", whose editorial columns had been searched over a period of almost six months in the hope that something would turn up to support a charge of contempt.

In effect, the Bar Association had set itself up as a self-appointed public censor of the press. Such a "pervasive threat" would impose an intolerable restraint upon the press.

The Amicus Curiae is vitally interested in the substantial principle that when a court exercises its power to punish for contempt by publication it acts to vindicate a public wrong. If a Bar Association committee is recognized as a proper means of initiating a contempt proceeding on the theory that it is beneficially interested in the outcome, then the door will be opened to other agencies with alleged grievances against the press and the constitutional guarantee will be whittled away by subtle encroachments.

The three editorials upon which the judgments of conviction are based are entirely free from any of the features which exceed the bounds of proper editorial analysis and opinion. None of them scandalizes the court, impeaches the integrity of any judge, imputes improper motives or utters threats. The publications are clearly free from elements which have been adjudged contemptuous by the courts. When measured by the "clear and present danger" test, it is submitted that the judgments of conviction in this case should be reversed.

Nothing in the editorials produces or is intended to produce a "clear and present danger" of the substantive evil of interference with the orderly process of judicial administration. The record does not show that any of the judges before whom the related cases were tried, read, or even heard of the editorials at the time they were published. It was not shown that any of the judges complained that he was embarrassed or intimidated by the editorials during

the pendency of the cases. There was no finding of an express intent to influence any of the judges. None of the three editorials appeared until the verdict of the jury had been rendered (R. 10, 17, 23). Moreover, when viewed from the standpoint of a judge of "ordinary firmness of character" it is manifest that no "clear and present danger" existed.

It is well established that whether or not publications are contemptuous will be determined by a fair interpretation of the language used. The words will be construed in their context and the general tone of the statements will be considered as well as the pertinent circumstances surrounding their publication. When the proceeding is criminal and punitive in nature, every intendment consistent with the defendant's innocence should be indulged.

The editorial "Sit-Strikers Convicted" (R. 11) merely records a forceful but not intemperate approval of a jury verdict which is in accord with the long established policy espoused by the "Times" (R. 43). It refers to the fact that the District Attorney had congratulated the jury and the community upon the verdict and agreed with him that it is one of the "most far-reaching verdicts in the history of this Court". This editorial represents an irreducible minimum of the kind of comment without which a newspaper cannot perform its function in expressing opinion on disputed questions of social and economic policy.

The editorial "The Fall of an Ex-Queen" (R. 17-18) is typical of numerous comments in newspapers of the anti-social effects of political "bossism". It merely points to the moral that the over-ambition for political power of a certain woman was responsible for her downfall and that this is but incident to the vicissitudes attending the rise and fall of political bosses.

The fact that the editorial "Probation for Gorillas?" (R. 23-24) states that "Judge A. A. Scott will make a

serious mistake if he grants probation" does not create a "clear and present danger" of interference with the judicial function. The editorial merely voices the opinion that the good of the community requires a denial of a pending petition for probation, a matter on which informed opinion is often sought from any interested party (R. 53-55). No attack is made upon the judge's character nor is he charged with prejudice or political bias. There is no demand for specific action and there is no threat of retaliation. The editorial is a proper exercise of the function of the press in presenting views on a vital public issue in the field of criminal law enforcement where complaints about ill-advised clemency are frequently expressed.[19]

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[19] There is no more vital issue relating to law enforcement before the public today. The records of the Federal Bureau of Investigation at Washington show that 30 per cent of the more than 13,000 criminals listed as the country's most dangerous have been the recipients of probation or other types of clemency, some of them as many as ten times. The Chief of that Bureau, Hon. J. Edgar Hoover, has frequently spoken out against such ill advised clemency.

In an address entitled, "Law Enforcement and the Citizen", delivered before the Chamber of Commerce of the State of New York, on February 7, 1935, at New York City, Mr. Hoover said: "Millions of dollars are being squandered because of ill-considered, ignorant, or politically controlled parole and clemency actions which release dangerous men and women to prey upon society."

In another portion of this address, Mr. Hoover said: "I repeat that this is a time when law enforcement must fight for its right to conquer the criminal world. To do this, it must combat the aids by which crime flourishes—easy parole, easy commutation, easy probation from 'sob-sister' judges, and, above all, that monumental fake which has too long been perpetrated upon the American public—the prison sentence which says one thing and means another."

In an address entitled, "Patriotism and the War Against Crime", before the annual convention of the Daughters of the American Revolution, on April 23, 1936, at Washington, D. C., Mr. Hoover said: "In scores of instances, we have seen these men arrested, watched them brought into court, and seen them freed on probation. • • • There is too much probation and too little probationary supervision. There is too much parole and practically no follow-up system in many states by which the filthy outflow of countless prisoners is held in control."

In that same address, he later said: "It is a rare thing when a youth is found who has not, to a certain degree, considered the results of his crime

The fact that the three editorials in question were not published until the verdict of the jury had been rendered also points to the pressing need for a clarification by this Court of the application of the "clear and present danger" test to publications alleged to be contemptuous when reference is made to a "pending" proceeding. Some courts have given greater scope to the freedom of editorial com-

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before he committed it, who has not reasoned that even though he is caught, he is still, to a degree, safe because of the mercies of probation or parole."

In an address entitled, "Problems of Identification", delivered before the Twenty-third Annual Convention of the International Association for Identification, at Washington, D. C., on September 30, 1937, Mr. Hoover said: "There is no medicine bottle in the world big enough to hold the nostrums of quacks who believe they can make criminals stop committing crimes by merely asking them to be good. There is no laboratory large enough to act as a central repository for all of the hashish dreams of moo-cow sentimentalists who believe that most criminals are nice boys who are misunderstood and who should be given probation or early parole instead of substantial prison sentences."

In an address entitled, "Hemming in the Criminal", made before the Association of Law Enforcement Officers of the Carolinas at Winston-Salem, North Carolina, on October 24, 1937, Mr. Hoover said: "And while we labor together, let us not forget for one instant that one of our greatest enemies remains the maladministrative scandal of cheap or easy freedom through parole or other forms of clemency."

In an address entitled "Public Duty in Law Enforcement", delivered before the Annual Convention of Life Insurance Presidents on December 3, 1937, Mr. Hoover, in referring to the matter of clemency, said: "Why do they disregard the fact that 30 per cent of the 13,519 dangerous criminals listed in the Federal Bureau of Investigation's single fingerprint file as the country's most desperate kidnapers, racketeers, hoodlums, bank robbers, and extortioners show a record of having been the recipients of parole or other types of clemency not only once, but in many cases as often as 4, 5, 6, 7, 8, 9, and 10 times?"

In an address, "Education for Living", which Mr. Hoover prepared to be delivered over the Blue Network of the National Broadcasting System on January 29, 1938, in a series of broadcasts sponsored by the General Federation of Women's Clubs, and was delivered by one of his assistants when it became impossible for the Director to participate due to his being in the North Woods looking for the hide-out where Mr. Charles Ross was held a kidnap victim, it was pointed out: "Similarly, I cannot help but believe that had the kidnaper and bank robber, Harry Brunette, been taught the fundamental lessons of citizenship and respect for lawful authority in his early life, he would not be serving a life sentence at Alca-

ment and criticism when the judicial proceeding is regarded as concluded.[20]

This Court has not had occasion to give full consideration either to the question of what is a "pending" proceeding or to the effect of a "pending" proceeding upon the weight to be given to freedom of discussion in determining whether there is a "clear and present danger" of creating the substantive evil of interfering with the independence and impartiality of the judicial system.

The dissenting opinion of Justice Gibson in the court below contains trenchant observations upon the difficulty of determining when a proceeding is "pending". As he aptly says:

> "To say that a case is pending until its final adjudication is to state a legal platitude in place of a practical doctrine." [21]

Justice Gibson refers to a rendition of the jury's verdict as "a period of relative finality" after which comment should be freely permitted.[22]

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traz today. His record reveals eleven paroles and three probationary sentences."

Mr. Hoover, in his book entitled "Persons in Hiding", on page 194, after recounting instance after instance of clemency violated on the part of William Dainard and Harmon Waley, the kidnapers of the little Weyerhaeuser boy, has this to say of Waley and treatment afforded him on one occasion: "Waley also was a bad prisoner. But he had a pleasant personality, he was young, and he said he wanted to get out to go home and help his mother. She needed him, he explained, and he had learned his lesson. So persuasive was this good-looking, tall, strong-shouldered youth with dark hair and eyes that he talked himself into a pardon within a year. Nor did it bother him when he was convicted of another robbery within three months. He talked the judge into giving him a suspended sentence. After that he returned almost at once to thievery, and for this was sentenced to from two to five years in Washington State Prison. In spite of a bad conduct record he was out again by September, 1933."

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[20] (1938) 48 Yale L. J. 54, 61, 62.

[21] 98 P. (2d) at p. 1045 (R. 147).

[22] *Ibid.*

The Amicus Curiae earnestly contends that if proper weight is given to the right of free discussion when balanced against the necessity for judicial independence, newspaper publishers should not be constrained to remain silent rather than assume the undue risk of commenting upon a judicial controversy until every conceivable legal procedure in connection therewith has been exhausted.

If this Court should reconcile the two rights involved by application of the "clear and present danger" test, the tendency of some courts to go to extreme lengths in stretching the definition of a "pending" cause would be arrested.

The importance of this consideration in judicial appraisal of the interests involved cannot be overestimated. Again referring to Justice Gibson's dissent, "the editorial page cannot be confined to abstract academic discussion of non-controversial matters or of issues long dead."[23] To perform effectively its function of comment and criticism, the press must deal with timely questions of current public concern. If it is compelled to abstain from discussion until every controversial aspect of an issue has been reduced to colorless facts, the right of the press to act as "one of the great interpreters between the government and the people" would be indeed barren.

Finally, it is necessary to refer to *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (1918), the only decision of this Court which, strictly speaking, passed upon the merits of a case involving constructive contempt by publication.[24]

Since the argument herein in support of the "clear and present danger" test sufficiently indicates the objections to the "reasonable tendency" test applied in the majority opinion in the *Toledo* case, the Amicus Curiae will not bur-

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[23] 98 P. (2d) at p. 1043 (R. 144).

[24] In *Craig* v. *Hecht*, 263 U. S. 255 (1923) the Court refused to review the case since petitioner relied upon *habeas corpus* when an appeal was open to him.

den the Court with further discussion of the objections to the "reasonable tendency" test. It is important, however, to note that the *Toledo* case antedates the basic decisions of this Court in the free press cases beginning with *Near* v. *Minnesota, supra.* In the years intervening since the *Toledo* case this Court not only has manifested an unswerving determination to accord the greatest possible weight to freedom of written discussion but it has also adopted the "clear and present danger" test in free speech cases. In those cases it has declared principles differing in no respect from those applicable to the press. There is every reason to believe, therefore, that this Court will reconsider and modify the doctrine of the *Toledo* case so as to bring it into harmony with the test of *Herndon* v. *Lowry, supra.*

It is worthy of note that legal scholars have subjected the majority opinion in the *Toledo* case to pungent criticism.

Mr. Justice Frankfurter and Dean James M. Landis (then Professors of Law in Harvard University) [25] in an article cited in the footnote discuss the limitations upon Congressional power with respect to the so-called "inherent powers" of inferior Federal courts to remove obstructions to the discharge of their work, namely, the power to punish for contempt. While deploring the use of the phrase "inherent powers" as "a constant invitation to think in words instead of things", the authors nevertheless recognize that the courts must be "invested with incidental powers of self-protection".[26] The authors then examine the history of the Act of 1831, the statute which the Court was called upon to construe in the *Toledo* case, and conclude as follows: [27]

> "The history of the times, the records of Congress, contemporary judicial construction, contemporary legal

[25] Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers (1924) 37 Harv. L. Rev. 1010, especially pp. 1029-1038.

[26] For the present wording of the Act, see 28 U. S. C. A. § 385 (1928).

[27] Frankfurter & Landis, *op. cit. supra* at p. 1029.

> writing, the reflex of contemporary State legislation, a series of adjudications culminating in a controlling Supreme Court decision should, one would suppose, have foreclosed any other opinion but that the Act of 1831 was intended to, and did, limit drastically the authority of the inferior Federal courts as theretofore exercised in the administration of the law of contempts."

In the light of the foregoing history the writers assert that Mr. Chief Justice White in the majority opinion "completely distorted" the situation giving rise to the Act of 1831 when he said that it was intended "to prevent the danger • • • of attempts to exercise a power not possessed which • • • had been sometimes done in the exercise of legislative power". To use Chief Justice White's own words, he concluded that the Act of 1831 "conferred no power not already granted and imposed no limitations not already existing".

This construction, the authors say, is based upon historical misinterpretations apparently induced in part by the brief for the Government upon which Mr. Chief Justice White relied. The authors observe [28] that

> "In truth, the abuse was not all 'in the exercise of legislative power'; the demonstrated abuse was in the exercise of judicial power. On its face the Act dealt with courts and not with Congress."

This criticism is pertinent to the issues in this case insofar as it may throw light on the need for a reconsideration of the doctrine of the *Toledo* case.

The Amicus Curiae is aware of the probability that such a reconsideration will also include a comparison of the "actual obstruction" test supported by the dissenting opinion of Justices Holmes and Brandeis in the *Toledo* case. This test was urged by Justice Gibson in his dissenting

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[28] *Ibid* at p. 1030.

opinion in the lower court in this case [29] and it has been applied by a few State courts.[30] Should this test find acceptance in this Court, the Amicus Curiae submits that its application to the editorials in this case would require a reversal of the judgment of conviction. The analysis of these editorials, as set forth above, shows that there was no actual obstruction or interference with the administration of justice. The Amicus Curiae also is convinced that the editorials are not contemptuous even when measured by the "reasonable tendency" test to which it has offered objections.

However, for the reasons already stated, it is respectfully urged that the "clear and present danger" test be adopted as the standard best suited to the full preservation of the cherished liberty of a free press without sacrifice of any part of the equally important right of a fearless, impartial and independent judiciary. In this way a definite and certain single standard of judgment will be applied in both free speech and free press cases on issues of the same substance so far as the content of the constitutional guarantees in the First and Fourteenth Amendments is concerned.

Conclusion.

It is respectfully submitted that the judgment of conviction of petitioners should be reversed.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMICUS CURIAE,

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[29] 98 P. (2d) at pp. 1043, 1044 (R. 143, 147).

[30] *State* v. *American News Co.*, 64 S. D. 385, 266 N. W. 827 (1936). *Cf. Nixon* v. *State*, 207 Ind 426, 193 N. E. 591 (1935).